SUPREME COURT, U.S.
FILED

061095 FEB 1 - 2006

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

LEONARD BOLDEN,

Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

Saul H. Krenzel, Esquire
Counsel of Record

SAUL H. KRENZEL & ASSOCIATES
42 South 15th Street, Suite 800
Philadelphia, PA 19102
(215) 977-7230

Nicholas J. Staffieri, Esquire
General Counsel for Southeastern
Pennsylvania Transportation Authority
Legal Division, Fifth Floor
1234 Market Street
Philadelphia, PA 19107
(215) 580-7450

QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania erred when it affirmed an intermediate appellate court decision that a door closer, attached to a door located in a passenger seating area of a commuter rail car, is a statutory "part or appurtenance" under the Locomotive Inspection Act ("LIA") when:

A. This decision is an unprecedented departure from this Court's seminal ruling in *Southern Railway Co. v. Lunsford*, 297 U.S. 398 (1936), holding that under the BIA (predecessor to the LIA) the statutory terms "parts or appurtenances" encompasses only those items that are integral or essential to a completed locomotive; and

B. This decision is in conflict with every federal and state court decision that has applied, without exception, *Lunsford's* definition of "parts or appurtenances" in determining strict liability under the LIA.

PARTIES

Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a transportation authority. SEPTA was statutorily created by the Commonwealth of Pennsylvania. 74 Pa. C.S. §1711. The Supreme Court of Pennsylvania has determined that SEPTA is a Commonwealth agency. *See Spencer v. Southeastern Pennsylvania Transportation Authority*, 525 Pa. 488, 581 A.2d 585 (1990).

Pursuant to Supreme Court Rule 28.1 Rule, the Petitioner is not required to file a corporate disclosure.

Petitioner employed Leonard Bolden as a conductor in its commuter rail division.

There are no other parties to this litigation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

1. Statement Of Facts 2

2. The Proceedings Below 5

REASONS FOR GRANTING THE PETITION 8

I. The Decision of the Highest Pennsylvania Appellate Court Conflicts with the Legislative Intent to Limit Strict Liability Under the LIA to the Locomotive. 9

II. Certiorari Should Be Granted Because the Decision of the Highest Pennsylvania Court Conflicts with this Court's Seminal Ruling in *Lunsford*. 12

III. Certiorari Should Be Granted Because the Decision of the Highest Pennsylvania Court Conflicts With Every Federal and State Court Which has Determined Whether a Part or Appurtenance is Subject to LIA Coverage and its Strict Liability. 14

IV. The Decision Below Was Wrongly Decided and Must Be Set Aside. 19

V. Federal Railroad Regulations Recognize that the MU Cab and the MU Passenger Compartment are Separate and Functionally Distinct.. 23

VI. Certiorari Should Be Granted Because this Case Involves Matters of Substantial Public Importance. 26

CONCLUSION 30

APPENDICES

Supreme Court Order Affirming Decision of the Commonwealth Court, dated November 3, 2006 . . . . . 1a

Order Granting Petition of Allocatur Entered by Pennsylvania Supreme Court on March 29, 2006 . . . . . 2a

Order from the Commonwealth Court Denying the Rehearing En Banc, dated May 17, 2005 . . . . . 3a

Opinion by the Commonwealth Court, reprinted at 872 A.2d 230,. Pa. Cmwlth., (2005) 4a

Order of the Commonwealth Court Affirming the Order of the Court of Common Pleas, dated August 16, 2004 . . . . . 10a

Opinion of the Court of Common Pleas 11a

Verdict Sheet Court of Common Pleas. 31a

TABLE OF AUTHORITIES

Cases: **Page**

Bankston v. Chesapeake & Ohio R. Co.,
128 Ill.App.3d 166, 470 N.E.2d 512
(Ill.App. Dist. 1984) 24

Barie v. Central Railroad Company of New Jersey,
71 N.J. Super. 587, 177 A.2d 568 (1962) 14

Bell v. Illinois Central Railroad Co.,
236 F. Supp. 2d 882 (N.D. Ill. 2001). 19

Burlington Northern R.W. v. City of Connell, 811 F.
Supp. 1459 (E.D. Wash. 1993),overturned on
other grounds, Southern Pac. Transp. Co. v. Pub.
Util. Comm'n of Ore., 9 F.2d 807 (9th Cir. 1993) . . 19

Bolan v. Lehigh Valley Railroad,
167 F.2d 934 (2nd Cir.1948) 15, 23

Calabritto v. New York, New Haven & Hartford R.R.,
287 F.2d 394 (2nd Cir. 1961), cert. denied, 366
U.S. 928 (1961). 11, 15, 26

Chicago, Rock Island & Pacific Railroad v. Speth,
404 F.2d 291 (8th Cir.1968). 16

Collins v. Union Pacific R. Co.,
2002 Mont. Dist. Lexis 1891 16

CSX v. Haischer, 151 Md. App. 147,
824 A.2d 966 (2003) 17

Delevie v. Reading Co., 176 F.2d 496 (3rd Cir. 1949) . 23

Donnelly v. National Railroad Passenger Corp.,
16 F.3d 941 (8th Cir. 1994) 14

Duchsherer v. Northern Pacific Railway Company,
4 Wash.App. 291, 481 P.2d 929 (1971) 17

Fashauer v. New Jersey Transit,
57 F.3d 1269 (3rd Cir. 1995) 14

Fontaine v. National Railroad Passenger Corp.,
63 Cal.Rptr.2d 644, 54 App. 4th 1519
(App. 3rd Dist. Cal. 1997) 16

Fritts v. Toledo Terminal R. Co.,
293 F.2d 361 (6th Cir.1961). 15

Garcia v. Burlington Northern Railroad Company,
818 F.2d 713 (10th Cir. 1987) 10

Gardner v. CSX Transportation, Inc.,
201 W. VA. 490, 498 S. E. 2d 473 (1997) 18, 19

General Motors v. Kilgore,
853 So.2d 171 (S.Ct. Ala. 2002). 19

Gowins v. Penn. R. Co., 299 F.2d 431 (6th Cir.),
cert. denied, 317 U.S. 824 (1962) 23

Green v. River Terminal Railway Co., 585 F.Supp.
1019 (N.D. Ohio 1984), aff'd, 763 F.2d 805
(6th Cir. 985). 15

Heiselmoyer v. Pennsylvania R.Co.,
243 F.2d 772 (3rd Cir. 1957) 15

Herold v. Burlington Northern, 761 F.2d 1241
(8th Cir. 1985), cert. denied, 474 U.S. 888 (1985) . . 16

Holfester v. Long Island Railroad,
360 F.2 369 (2nd Cir. 1966). 15

Hubbard v. National Railroad Passenger Corporation,
2004 WL 1977646 (Mich. App) 17

Kernan v. American Dredging Co.,
355 U.S. 426 (1958) 10

King v. Southern Pacific Transportation Co.,
855 F.2d 1485 (1988) 18, 19, 23

Kleeberg v. Norfolk Southern Railway Co.,
2001 WL 914460 (N.D.Ill 2001) 16

Lakin v. Consolidated Rail Corp.,
545 N.E. 2d 843 (Ind. 1989) 17

Law v. General Motors Corporation,
1995 WL 542496 (N.D. Cal. 1995) aff'd,
14 F.3d 908 (9th Cir. 1997) 5, 18

Lilly v. Grand Trunk Western R.Co.,
317 U.S. 481 (1943) 5, 15

Louisville & N.R. Co. v. Botts,
173 F.2d 164 (8th Cir. 1949) 16, 23

Louisville & N.R. Co. v. Stephens,
298 Ky. 328, 182 S.W. 2d 447 (1947) 17

Marshall v. Burlington Northern, Inc.,
720 F.2d 1149 (9th Cir. 1983) 10, 16

McGinn v. Burlington Northern Railroad Company,
102 F.3d 295 (7th Cir. 1996) 18, 19

Missouri P.R. Co. v. Railroad Com. of Texas,
833 F.2d 570 (5th Cir. Tex. 1987) 18

Mosco v. Baltimore & Ohio Railroad,
817 F.2d 1088 (4th Cir. 1987), cert. denied, 484
U.S. 851 (1987) 5, 17, 19, 21

Ogelsby v. Del. & Hudson Rwy. Co.,
180 F.3d 458 (2nd Cir. 1999) 18

Pennsylvania R.Co. v. Pomeroy,
239 F.2d 435 (C.A.D.C. 1957), cert. denied, 353
U.S. 980 (1957) 14

Peyton v. St. Louis Southwestern Ry. Co,
962 F.2d 832 (8th Cir. 1992) 14

Roth v. I & M Rail Link, et al., 179 F.Supp. 2d
1054 (S.D. Iowa 2001) 19

Seaboard Coast Line Railroad v. Jackson, 256 So.2d 568 (Fla. 1971), cert. denied, 409 U.S. 1001 (1972) 17

Southern Railway Co. v. Lunsford, 297 U.S. 398 (1936) ..... *passim*

Southern Railway Co. v. Bryan, 375 F.2d 155 (5th Cir.), cert. denied, 389 U.S. 827 (1967) 15

Spencer v. Southeastern Pennsylvania Transportation Authority, 525 Pa. 488, 581 A.2d 585 (1990) i

Taylor v. National Railroad Passenger Corp., 310 F.Supp.2d 72 (E.D. Pa. 2004) 14

Thirkill v. J.B. Hunt Transport, Inc., 950 F.Supp. 1105 (N.D. Ala. 1996) 18

Tiller v. Atlantic Coast Line Railroad, 323 U.S. 574 (1945) 15

U.S. v. Granderson, 511 U.S. 39 (1990) 29

Urie v. Thompson, 357 Mo., 738, 210 S.W. 2d 98 (1948), rev'd on other grounds, 337 U.S. 163 (1949) 27

Urie v. Thompson, 357 U.S. 163 (1949) 10

Weaver v. Missouri Pacific Railroad, 152 F. 3d 427 (5th Cir. 1988) 17, 19, 21

Whaley v. CSX, 362 S.C. 456, 609 S.E. 2d 286 (2005) 18

Whelan v. Penn Central Company, 503 F.2d 886 (2nd Cir. 1974) 15, 23

Williams v. National Railroad Passenger Corp., 161 F.3d 1059 (7th Cir. 1988) 14

Zollinger v. Pittsburgh & Lake Erie Railroad, 337 F.Supp. 913 (W.D.Pa. 1972) 16

Statutes and Regulations

28 U.S.C. §1257(a) 1
45 U.S.C. §23 ..... 5, 9, 10
45 U.S.C. §51, et. seq.. ..... 5, 9
49 U.S.C. §20701 ..... 1, 5
74 Pa. C.S. §1711 ii
49 CFR. Part 229 6
49 CFR. Part 229.7 26
49 CFR. Part 229; 229.119 25
49 CFR. Part 238 26
49 CFR. Part 238.5 26

Rules

Supreme Court Rule 28.1 ii

Miscellaneous Authorities

H.R. 86th Cong., 1st Sess., No. 490 11
S.Rep. 63rd Cong. 3d Sess., No. 1068 11
S.Rep. 86th Cong. 2nd Sess., No. 740 11
46 Cong. Rec. 2071 (1911) 11

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania is reprinted in the App. at 1a. The Order granting Allocatur addressing a federal question is reprinted in the App. at 2a. The Order of the Commonwealth Court of Pennsylvania denying Petitioner's Application for Reargument is reprinted in the App. at 3a. The Opinion and Order of the Commonwealth Court of Pennsylvania from which the appeal was taken to the Supreme Court of Pennsylvania are reprinted at App. at 4a - 10a. The Opinion and Order of the Court of Common Pleas of Philadelphia County from which the appeal was taken to the Commonwealth Court of Pennsylvania are reprinted at App. at 11a- 30a.

JURISDICTION

The Supreme Court of Pennsylvania affirmed a judgment on a claim brought pursuant to a federal statute (the "LIA"), on November 3, 2006. App. at 1a. The grant of Allocatur to the Pennsylvania Supreme Court specifically stated that the question for review concerned the interpretation of a federal statute. App. at 2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTES INVOLVED

This Petition concerns the Locomotive Inspection Act, 49 U.S.C. §20701 ("LIA" or "Act"). Section 20701 provides as follows:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts or appurtenances:

1. are in proper condition and safe to operate without unnecessary danger of personal injury;

2. have been inspected as required under the Act and regulations prescribed by the Secretary of Transportation under the Act; and

3. can withstand every test prescribed by the Secretary of Transportation under this Act.

STATEMENT OF THE CASE

1. Statement Of Facts

On August 14, 1997, the Petitioner employed Leonard Bolden as a train conductor in its commuter rail division. Mr. Bolden was assigned to work on Petitioner's R-5 commuter rail line which provides transportation for commuters between Paoli, Pennsylvania and Lansdale, Pennsylvania with stops in the City of Philadelphia.

The train in use at the time of Mr. Bolden's accident consisted of three commuter rail cars. Each of the end cars had an operating compartment or "cab" where the engineer sits and operates the train. The end cars are known as "MU cars." An MU car is an electronically propelled railcar with a separate passenger compartment and a separate operating cab.

The operating compartment of the MU car is commonly referred to as the "head end" or "cab." The door to the operating compartment remains locked at all times during the operation of the train. The locked cab door separates the operating compartment from the passenger compartment or seating area which is to the rear of the cab.

To board the MU car, passengers must first pass through an exterior door located on the side and at the back of the MU car, enter into a vestibule, and then walk through a parlor door leading to the passenger compartment. The parlor door is at the complete opposite end from the operating compartment. The distance between the parlor door, which opens into the passenger compartment, and the clearly delineated operating cab is 50 feet.

On August 14, 1997, Mr. Bolden boarded the R-5 train at Suburban Station in Center City Philadelphia. Mr. Bolden was part of a train crew that included Deidre Rich, a passenger assistant, and Jerry Fallis, the engineer. Mr. Bolden's crew was relieving the previous train crew that was completing their shift. As is customary, a member of Mr. Bolden's train crew discussed the status of the train with the departing crew. In particular, the focus of the discussion was to determine if there were any problems with the train's operation. The departing crew indicated that there were no problems.

When Mr. Bolden and the crew boarded the train at Suburban Station, the lead car was number 420; the middle car was number 419; and the rear car number was 402. The train departed Suburban Station and headed in a northbound direction to Lansdale. Mr. Bolden, a conductor, and Deidre Rich, a passenger assistant, worked only in the passenger seating areas, collecting fares and tickets and providing assistance to passengers. Neither Mr. Bolden nor Ms. Rich worked in the operating cab. Mr. Fallis, in the cab of car 420, operated the train in a northerly direction to Lansdale. Upon arriving in Lansdale, Mr. Fallis changed ends in order to make the southbound trip back to Center City. Once the

ends were changed, car number 402 became the lead car; 419 remained in the middle; and car 420 became the rear car.

At Lansdale, Mr. Fallis did not use the vestibule or parlor door on MU 402 to gain access to the operating compartment. Mr. Fallis ascended a ladder attached to the cab of MU 402 and entered through a door at the top of the ladder to access the operating compartment. The ladder and door that Mr. Fallis used only provided entry to the operating cab.

In Lansdale, Mr. Bolden walked through the interior of the train from the rear car 420, through the middle car 419 and into the passenger compartment located at the very back of car 402. In doing so, Mr. Bolden moved through parlor doors on cars 420, 419 and 402. According to Mr. Bolden, it was this last passenger or parlor door which contained a defective door closer.

Mr. Bolden testified that when he pushed through the parlor door to enter the passenger compartment of car 402 he did not experience any resistant tension from the door and this caused him to fall onto the floor of the passenger area of the car. Mr. Bolden injured his shoulder as a result of the fall. Prior to this occurrence, neither passengers nor employees had any complaints about the door or the door closer. After Mr. Bolden's incident, the train continued on its route with the parlor door wedged open. At the end of Mr. Bolden's shift, another crew took over and the three-car train continued to operate for the rest of the day without further incident.

2. The Proceedings Below.

Mr. Bolden filed suit against Petitioner in the Court of Common Pleas for Philadelphia County, claiming that Petitioner's negligence caused his injuries under the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.* Mr. Bolden also claimed that Petitioner was strictly liable to him for his injuries under the LIA, 49 U.S.C. §20701. The LIA (successor to the BIA) imposes upon rail carriers an absolute duty to maintain their locomotives and their parts and appurtenances in proper and safe operating condition.[1]

Liability is established under the LIA when there is a violation of any regulation enacted pursuant to

---

[1] In 1994, Congress re-codified the BIA as part of its re-codification of "laws related to transportation in one comprehensive title." *Law v. General Motors Corporation*, 1995 WL 542496, n. 3 (N.D. Cal. 1995), *aff'd*, 114 F.3d 908 (9th Cir. 1997). The 1994 re-codification included only minor modifications in the language of the BIA, simply for the purpose of promoting clarity and consistency. *Id.* At the time of the re-codification, the BIA was renamed the "Locomotive Inspection Act" Throughout, Petitioner refers to the BIA and LIA interchangeably. The application of the BIA case law to cases arising under the LIA has been embraced by all jurisdictions addressing LIA claims.

Liability under the LIA, like its predecessor the BIA, is not based on the negligence of a railroad. *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 485 (1943). Common carriers by railroad have "an absolute duty to maintain their locomotives in safe and proper condition" under the LIA. *Id.*; *Mosco v. Baltimore & Ohio Railroad*, 817 F.2d 1088, 1090 (4th Cir. 1987), *cert. denied*, 484 U.S. 851 (1987) (Railroads that violate the LIA may be strictly liable to employees who are injured as a result of the violation.)

49 C.F.R. Part 229 or where a defective part or appurtenance of a locomotive causes an injury. Mr. Bolden did not base his claim on a violation of any regulation enacted pursuant to Part 229. Mr. Bolden contended that the door closing mechanism on the door allowing entry into the passenger compartment was a "part or appurtenance" of a locomotive rendering Petitioner strictly liable for his injuries under the LIA.

At trial, the jury returned a verdict in favor of Petitioner on Mr. Bolden's FELA claim. However, the jury returned a verdict in favor of Mr. Bolden on his LIA claim in the amount of $460,000.00. The Court of Common Pleas entered judgment on Mr. Bolden's LIA claim and against the Petitioner. App. at 31a.

In its Post-trial Opinion upholding the jury verdict, the trial judge determined that the LIA should be read broadly to include the door closer of the MU car without taking into account whether the door closing mechanism was integral or essential to a completed locomotive as required under the seminal decision of this Court in *Southern Railway Co. v. Lunsford*, 297 U.S. 398 (1936). App. at 20a, 24a.

The *Lunsford* Court defined a statutory "part or appurtenance" under the BIA as "*Whatever in fact is an integral or essential part of a completed locomotive* and all parts or attachments definitively prescribed by lawful order of the Interstate Commerce Commission." 297 U.S. at 402 (emphasis added). *Lunsford* made it very clear that strict liability under the BIA would attach only when an injury was caused by a defective part or appurtenance that was integral or essential to the locomotive's operation.

Despite this Court's decision in *Lunsford* defining the statutory meaning of parts or appurtenances of a locomotive, the trial court declined to follow *Lunsford*. The trial court reasoned that *Lunsford* was inapplicable to a claim that a carrier failed to properly maintain a part or appurtenance. Instead, the trial court chose to refer to dictionary definitions of a "part" found in Black's Law Dictionary and the Merriam-Webster Online Dictionary in determining whether Mr. Bolden had stated a claim for relief under the LIA. App. at 21a-23a. Grounding its decision on these dictionary definitions, the trial court concluded that Petitioner was strictly liable to Mr. Bolden under the LIA because the door closer "is an appendage and accessory of the operating compartment" of the MU train. App. at 22a.

Petitioner timely appealed to the Superior Court of Pennsylvania on the basis that the trial court's decision was at odds with *Lunsford* and every case, state or federal, that has interpreted the meaning of "parts or appurtenances" under the LIA. The Superior Court subsequently transferred the appeal to the Commonwealth Court of Pennsylvania.

On appeal, the Commonwealth Court ruled that this Court's decision in *Lunsford*, *supra*, did not apply to the facts presented in this case. The Commonwealth Court held that the *Lunsford* definition of parts and appurtenances applied only to cases that involved experimental devices (such as the part at issue in *Lunsford*) and to cases in which the plaintiff alleges that a railroad failed to install required equipment on a locomotive. App. at 6a-7a. With these limitations, the Commonwealth Court excluded from *Lunsford's* controlling precedent all

claims asserting that a carrier failed to maintain a part or appurtenance of a locomotive.

The Commonwealth Court noted that in its view existing jurisprudence had not specifically addressed whether a door closer on a passenger door was a part or appurtenance under the LIA App. at 7a. Having determined that *Lunsford* was inapplicable, the Commonwealth Court developed its own test to determine whether the door closer was covered under the LIA. App. at 7a-8a. To that end, the Commonwealth Court found that the door closer enhanced passenger and employee safety; assisted employees in their duties; and the LIA was a broad remedial Act. Based on this analysis, the Commonwealth Court concluded that the defective door closer, attached to a door opening into a passenger seating area, was a statutory part or appurtenance under the LIA. The Commonwealth Court affirmed the trial court's decision upholding the verdict against Petitioner under the LIA. App. at 9a.

Following the decision of the Commonwealth Court, a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania was accepted. The Petition for Allocatur was granted on the question of whether the door closing mechanism was a "part or appurtenance" under the LIA. App. at 2a. Following briefing and oral argument, the Supreme Court of Pennsylvania affirmed the decision of the Commonwealth Court without an opinion. App. at 1a.

REASONS FOR GRANTING THE WRIT

The decision and Order of the Supreme Court of Pennsylvania expands the reach of the LIA in a manner that defies binding precedent – *Lunsford* –

and 70 years of consistent and unbroken case law applying *Lunsford* to the interpretation of the LIA. The Supreme Court of Pennsylvania is the only tribunal, federal or state, that has failed to follow the *Lunsford* test in determining whether a part or appurtenance is subject to LIA coverage. As a result, the Pennsylvania Courts have imposed strict liability on a rail carrier for an injury that occurred in a passenger area of a train car. This unwarranted and unreasonable expansion of the LIA is inconsistent with the Congressional intent supporting the passage of the Boiler Inspection Act ("BIA") and is contrary to controlling precedent of this Court on a matter of federal law.[2]

The Supreme Court of Pennsylvania's departure from this Court's binding precedent has created a conflict in the jurisprudence interpreting a federal statute and involves a matter of public importance affecting interstate commerce. For these reasons, certiorari should be granted.

I. The Decision of the Highest Pennsylvania Appellate Court Conflicts with the Legislative Intent to Limit Strict Liability Under the LIA to the Locomotive.

To understand the magnitude of the extraordinary error that occurred, it is necessary to consider the history of rail carrier liability to employees injured on the job. In 1908, Congress passed the Federal Employers Liability Act ("FELA") 45 U.S.C. §51, et. seq. The FELA imposed upon rail carriers the responsibility of paying damages to employees injured

---

[2] Petitioner has used the word "locomotive" to include the locomotive, tender and their parts or appurtenances.

on the job as a result of the carrier's negligence. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). Thus, from 1908 to 1911, employees of rail carriers could recover damages for work related injuries that occurred if the carrier was negligent. FELA covered all areas of the train.

In 1911, the Boiler Inspection Act ("BIA") was enacted during the period when railroads used steam locomotives. The BIA was substantively, if not in form, an amendment to the FELA. *See Urie v. Thompson*, 337 U.S. 163, 189 (1949). In contrast to FELA, the purpose of the BIA was to protect employees and passengers of rail carriers for injuries that occurred as a result of locomotive operations without considering the negligence of the railroad. Congress recognized that steam locomotives had inherent dangers because they could explode violently and cause serious damage to persons and property. The BIA was intended to protect railroad employees in the event of boiler explosions in steam locomotives. Railroad employees working on locomotives with boilers were exposed to potentially extreme hazards. In order to prompt the carriers to undertake rigorous inspections and to initiate the steps necessary to eliminate these hazardous, carriers were subject to strict liability for violations of the BIA. *See Garcia v. Burlington Northern Railroad Company*, 818 F.2d 713, 715 (10th Cir. 1987).

In 1915, the BIA was amended to cover the entire locomotive and its "parts or appurtenances." 45 U.S.C. §23; *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The reason for the amendment to the statute is illustrated in the legislative history supporting the passage of the BIA and its subsequent amendment in 1915:

> The initial debate [1911] on the floor of the House indicated that *the legislators were primarily concerned with boiler explosions.* Representative Mann, Chairman of the House Committee on Interstate and Foreign Commerce, which reported the bill, said 'It is the belief of all people concerned, both the railroads and the employees that *the passage of this bill will materially result in the lessening of boiler explosions.*' 46 Cong. Rec. 2071 (1911). Representative Robinson spoke of accidents caused by 'defective boilers,' *Id.* at 2072, and Representative Peters of explosions, steam pressure, and the need to inspect boilers from the inside, *Id.* at 2074. The broadening of the Act in 1915, was recommended by the Senate Committee on Interstate Commerce, S.Rep., 63rd Cong., 3d Sess., No. 1068, which said:
>
> '*This measure provides for the inspection of the entire locomotive.* Experience has shown that this is necessary and *desirable for the proper safeguarding of the lives of those who travel and of those engaged in the operation of locomotives.*'
>
> The House Report on the 1924 amendment, 68th Cong., 1st Sess., No. 490, reprinted a letter from the Interstate Commerce Commission which spoke in passing *of accidents 'resulting from the failure of some part or appliance of the locomotive or tender.'* P. 3. The Senate Report, No. 740, simply reprinted the House report with approval.

Calabritto v. New York, New Haven & Hartford R.R., 287 F.2d 394, 398 (2nd Cir. 1961), *cert. denied*, 366 U.S.

928 (1961). (Emphasis added). The 1915 amendment was specifically concerned with injuries and accidents that occurred from a defective part or appurtenance on a locomotive or its tender. It is beyond argument that the operation of a locomotive involved hazards not present in other train areas such as the passenger compartments.

The enactment of the BIA and its amendment, reveal that the intent of Congress in supporting the passage of the BIA, with its strict liability, was to protect individuals from the undue hazards associated with the operation of a locomotive.

II. Certiorari Should Be Granted Because the Decision of the Highest Pennsylvania Court Conflicts with this Court's Seminal Ruling in *Lunsford*.

Lunsford provided this Court with the opportunity to define and give meaning to the "parts or appurtenances" language of the BIA. The *Lunsford* Court noted that the BIA imposed upon a rail carrier an absolute duty to maintain a locomotive and its parts or appurtenances in proper operating condition. Significantly, but inexplicably lost on the courts below, the *Lunsford* Court pronounced without qualification that it would "give definite interpretation to the statutory terms parts and appurtenances." 297 U.S. at 401. The *Lunsford* Court ruled that a statutory part or appurtenance is: "*Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission.*" *Id.* (emphasis added).

Lunsford involved the question of whether an experimental device attached to a locomotive to

prevent a derailment was encompassed by the BIA. Relying on testimony of the general superintendent of the railroad who testified that the use of the device could not possibly endanger the operation of the train nor did it enhance safety, this Court concluded that the device was not a part or appurtenance of a locomotive within the meaning of the BIA. *Id.* at 400. Nowhere in *Lunsford* does this Court suggest that its definition of "parts or appurtenances" applied only to the specific fact pattern before it. To the contrary, this Court stated that it would take the opportunity to give definite meaning to the statutory terms "parts or appurtenances." There is nothing in the *Lunsford* decision that limits its definition of "parts or appurtenances" to a particular fact pattern or class of claims.

Lunsford properly gave effect to Congressional intent supporting the enactment of the BIA now known as the LIA. *Lunsford's* definition of the terms "parts or appurtenances" of a locomotive comports with the intended scope of the BIA – strict liability for injuries due to a failure of a part that is associated with the hazardous activity Congress sought to remediate – locomotive operation.

Lunsford leaves no doubt that strict liability under the BIA extends no further than the locomotive (and tender) and their integral or essential parts. The *Lunsford* decision comports with the Congressional intent supporting passage of the BIA, the express language of the statute, and follows the BIA's focus on the hazards associated with locomotives and their operation. Strict liability does not apply to injuries that occur to employees (or passengers) of a rail carrier in a passenger area of a train. Before and

after the enactment of the BIA, FELA or common law negligence theories covers these claims.[3]

III. Certiorari Should Be Granted Because the Decision of the Highest Pennsylvania State Court Conflicts With Every Federal and State Court Which has Determined Whether a Part or Appurtenance is Subject to LIA Coverage and its Strict Liability.

The trial court's decision (and the Commonwealth Court's decision that followed) ignored 70 years of jurisprudence applying *Lunsford* in determining LIA coverage. The decision at issue here is extraordinary. The Commonwealth of Pennsylvania stands alone in holding that a railroad is strictly liable for a defect in a part located in a passenger area of a train. Every tribunal, without exception, has held that in order for strict liability to attach under the LIA, a defective part or appurtenance must be integral or essential to the locomotive. A passenger door leading to the

---

[3] FELA covers cases involving injuries arising in a passenger area of a train car. FELA requires railroads to provide its employees a reasonably safe work environment and safe work equipment. *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832 (8th Cir. 1992). In cases where passengers have been injured or killed as a result of improperly operating vestibule doors, the claims against the railroad are brought on the basis of negligence, not strict liability under the LIA. *See, e.g., Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1988); *Fashauer v. New Jersey Transit*, 57 F.3d 1269 (3rd Cir. 1995); *Taylor v. National Railroad Passenger Corp.*, 310 F. Supp.2d 727 (E.D. Pa. 2004); *Donnelly v. National Railroad Passenger Corp.*, 16 F.3d 941 (8th Cir. 1994); *Barie v. Central Railroad Company of New Jersey*, 71 N.J. Super. 585, 177 A.2d 568 (1962); *Pennsylvania R. Co. v. Pomeroy*, 239 F.2d 435 (C.A. D.C. 1957), *cert. denied* 353 U.S. 980 (1957).

seating area in a passenger compartment is not associated in any way with the hazards inherent in operating a locomotive.[4]

Every court that has reviewed the LIA's applicability to a *failure to maintain* claim, has applied *Lunsford*, notwithstanding the Commonwealth Court's illogical and unsupported conclusion that *Lunsford* applied only to: (1) cases involving experimental devices; and (2) to claims alleging that a rail carrier failed to install equipment on a locomotive. All cases decided after *Lunsford*, either federal[5] or state[6], are consistent in applying

---

[4] See cases at footnote 3.

[5] *See, e.g., Tiller v. Atlantic Coast Line Railroad*, 323 U.S. 574 (1945) (headlight on a locomotive); *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481 (1943) (boiler spout on a locomotive was a part or appurtenance); *Bolan v. Lehigh Valley Railroad*, 167 F.2d 934 (2nd Cir.1948) (pilot step attached to a locomotive found to be a part or appurtenance); *Calabritto v. New York, New Haven & Hartford R.R.*, 287 F.2d 394, 398 (2nd Cir. 1961), *cert. denied*, 366 U.S. 928 (1961) (locomotive platform found to be a part or appurtenance); *Whelan v. Penn Central Company*, 503 F.2d 886 (2nd Cir. 1974) (step on a locomotive for the engineer to enter operating compartment was a part and appurtenance); *Heiselmoyer v. Pennsylvania R. Co.*, 243 F. 2d 773 (3rd Cir. 1957) (a cab seat is an essential part of a completed locomotive); *Holfester v. Long Island Railroad*, 360 F.2d 369 (2nd Cir.1966) (court found that a fuse box attached to a locomotive was a part or appurtenance); *Southern Railway Co. v. Bryan*, 375 F.2d 155 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967) (court found that a lifting eye was an essential part of the locomotive's operation, therefore, it was a part and appurtenance); *Fritts v. Toledo Terminal Railroad*, 293 F.2d 361 (6th Cir.1961) (court found that a fireman's seat located in the operating compartment of a locomotive was a part and appurtenance); *Green v. River Terminal R. Co.*, 585 F. Supp. 1019 (N.D. Ohio 1984), aff'd, 763

(footnote continues)

Lunsford's integral or essential test to failure to maintain claims and, indeed, to any other theory that a plaintiff advances under the LIA.

To illustrate the unprecedented departure that the Pennsylvania Courts have embarked upon, each federal and state decision set out in footnotes four and

---

(footnote continued)

F.2d 805 (6th Cir. 1985); (discussing *Lunsford* and whether a radio in the operating compartment was a part or appurtenance of a locomotive); *Herold v. Burlington Northern*, 761 F.2d 1241, 1246 (8th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985) (the court found that the *Lunsford* test applied when it determined that an amber rotating beacon on a locomotive was a part or appurtenance because it is integral or essential to the locomotive's operation); *Louisville & N.R. Co. v. Botts*, 173 F.2d 164 (8th Cir. 1949) (court found a dangerous bolt on switch engine to be a part and appurtenance); *Chicago, Rock Island & Pacific Railroad v. Speth*, 404 F.2d 291 (8th Cir.1968) (warning torpedoes located inside the engine cab); *Marshall v. Burlington Northern, Inc.*, 720 F. 2d 1149 (9th Cir. 1983) (there is a duty to maintain parts and appurtenances attached to a locomotive, however, no proof offered that the lights were attached at time of accident): *Kleeberg v. Norfolk Southern Railway Co.*, 2001 WL 914460 (N.D.Ill. 2001) (court found that a cab seat located in the operating compartment was a part and appurtenance); *Collins v. Union Pacific R.Co.*, 2002 Mont. Dist. Lexis 1891 (cab door was an integral and essential part of locomotive); *Zollinger v. Pittsburgh & Lake Erie Railroad*, 337 F.Supp. 913 (W.D.Pa.1972) (a push-pole integral to the use of the locomotive and found to be a part and appurtenance).

[6] *See, e.g., Fontaine v. National Railroad Passenger Corp.*, 63 Cal.Rptr.2d 644, 54 App.4th 1519 (App. 3rd Dist. Cal. 1997), (the court specifically relied on *Lunsford* and stated that ([t]here is no question the ladder at issue was an integral or essential part of a completed locomotive: it permitted personnel movement between the ground and the locomotive's rear platform

(footnote continues)

five concerned claims asserting that a carrier failed to maintain a part or device. To be sure, the vast majority of LIA claims assert that the carrier failed to maintain a part or appurtenance. Yet not one of these cases has concerned a part located in a passenger area of a train and not on the locomotive.

Adherence to *Lunsford* is also found in every case in which a plaintiff has asserted a claim on the theory that a railroad failed to install required equipment on a locomotive.[7] The foregoing *failure to install* and

---

(footnote continued)

connecting to the engine compartment); *Seaboard Coast Line Railroad v. Jackson*, 256 So.2d 568 (Fla.1971), *cert. denied*, 409 U.S. 1001, (1972) (radio located in the operating compartment of the locomotive found to be a part and appurtenance); *Louisville & N.R. Co. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447(Ct. App. Ky. 1944) (appliance is so important as to be an integral or essential part of the completed locomotive whether or not there is a specific regulatory provision); *Lakin v. Consolidated Rail Corp.*, 545 N.E. 2d 843 (Ind. 1989); *CSX v. Haischer*, 151 Md. App. 147, 824 A.2d 966 (2003) (ascending stairs from the nose of locomotive and struck by cover of the head train device which was found to be an integral part of locomotive); *Hubbard v. National Railroad Passenger Corporation*, 2004 WL 1977646 (Mich.App. 2004); *Duchsherer v. Northern Pacific Railway Company*, 4 Wash.App. 291, 481 P.2d 929 (1971) (court found that a turntable attached to the front of a locomotive and used in the operation of a locomotive was a part and appurtenance).

[7] It is correct that *Lunsford* is controlling precedent over all cases brought under the LIA including cases asserting that a carrier *failed to install* a needed part, *see* e.g., failure to install cases: *Mosco v. Baltimore & Ohio Railroad*, 817 F.2d 1088 (4th Cir. 1987), *cert. denied*, 484 U.S. 851 (1987)(failure to install protective devices for locomotive windows were not "integral or essential" to a completed locomotive); *Weaver v. Missouri Pacific Railroad*, 152 F.3d 427 (5th Cir. 1998) (failure to install

(footnote continues)

failure to maintain cases unequivocally demonstrate that the *Lunsford* test of "Whatever in fact is integral or essential to the completed locomotive" is the polestar for strict liability under the LIA.[8]

Lunsford and its progeny also teach that not every part or appurtenance *on* a locomotive is covered under the LIA: only those parts that are integral or essential to the locomotive and its operation. In

---

(footnote continued)

air conditioning and screens on locomotives; court held that they were not parts or appurtenances of a completed locomotive); *McGinn v. Burlington Northern Railroad Company*, 102 F.3d 295 (7th Cir. 1996) (failure to install luggage rack in a locomotive; court held luggage rack was not an integral or essential component to the operation of a locomotive); *King v. Southern Pacific Transportation Co.*, 855 F. 2d 1485 (10th Cir. 1988) (it would have to be established that armrests in the cab were an integral or essential part of the locomotive for the plaintiff to state a claim); *Whaley v. CSX*, 362 S.C. 456, 481, 609 S.E. 2d 286, 299 (2005) (Supreme Court of South Carolina stated that "a carrier cannot be held liable under the [LIA] for failure to install equipment [unless it]. . . constitutes an essential or integral part of a completed locomotive"); *Gardner v. CSX Transportation, Inc.*, 201 W. VA. 490, 498 S.E. 2d 473 (1997) (court held that seat belts and armrests which were not installed in the locomotive were not integral or essential to a locomotive).

[8] For example, *Lunsford's* analytical framework has been applied in preemption cases in order to determine whether or not a state claim is precluded because of coverage under the LIA. *See, e.g., Ogelsby v. Del. & Hudson Rwy. Co.*, 180 F.3d 458 (2nd Cir. 1999); *Missouri P.R. Co. v. Railroad Com. of Texas*, 833 F. 2d 570 (5th Cir. Tex. 1987); *Thirkill v. J.B. Hunt Transport, Inc.*, 950 F. Supp. 1105 (N.D. Ala. 1996); *Law v. General Motors Corporation, et al.*, 1995 WL 542496 (N.D. Cal.) *aff'd*, 114 F.3d 9 908 (9th Cir. 1997); *Roth v. I & M Rail Link, et. al.*, 179 F. Supp.

(footnote continues)

Mosco v. Baltimore & Ohio Railroad, supra, 817 F.2d at 1091, the court cited *Lunsford* and held that protective devices for locomotive windows were not "integral or essential" to a completed locomotive. *See also Weaver v. Missouri Pacific Railroad, supra*; *McGinn v. Burlington Northern Railroad Company, supra*; (a luggage rack on a locomotive would not constitute a mechanism integral or essential to the operation of the locomotive. *Id.* at 299.); *Gardner v. CSX Transportation, Inc., supra*; (holding that seat belts and armrests for a cab seat in a locomotive were not "integral or essential" to the locomotive, therefore, not a part or appurtenance under the LIA). In *King v. Southern Pacific Transportation Co.*, 855 F.2d 1485 (10th Cir. 1988), the court, citing *Lunsford*, observed that the cases holding railroads liable under the LIA for a failure to maintain, concern devices on the locomotive. The *King* court understood the Congressional intent supporting the passage of the BIA and that its remedial purpose was to eliminate

---

(footnote continued)

2d 1054 (S.D. Iowa 2001); *Bell v. Illinois Central Railroad Co.*, 236 F. Supp. 2d 882 (N.D. Ill. 2001); *Burlington Northern Railroad v. City of Connell*, 811 F. Supp. 1459 (E.D. Wash. 1993) *overturned on other grounds, Southern Pac. Transp. Co. v. Pub. Util. Comm'n of Ore.*, 9 F.2d 807 (9th Cir. 1993) (the court stated that the LIA preempts any state rule which encompasses an integral or essential part of a completed locomotive in deciding whether a City ordinance was preempted by the LIA); *General Motors v. Kilgore*, 853 So. 2d 171 (S.Ct. Ala. 2002) (the Supreme Court of Alabama held that the this court's definition in *Lunsford* of "parts or appurtenances" encompassed whatever in fact is an integral or essential part of a completed locomotive when it found that the LIA preempts a state wrongful death action).

the hazards of locomotive operation. The *King* court correctly concluded that a defective part, as a threshold matter, must be on the locomotive and, thereafter, a determination of whether it is integral or essential to the locomotive.

A door closer that is located on an interior door entirely within a passenger compartment is not "in fact" a part or appurtenance on the locomotive and, most assuredly, is not integral or essential to the locomotive's operation.

IV. The Decision Below Was Wrongly Decided and Must Be Set Aside.

The Commonwealth Court of Pennsylvania below interpreted *Lunsford* as being limited to cases involving experimental devices or involving claims alleging that a railroad failed to install required equipment on a locomotive. App. at 6a-7a. This holding by the court created out of thin air a limitation in *Lunsford* that cannot be found in any case that has been decided in the last 70 years. The Commonwealth Court's conclusion that the "integral or essential" test set forth in *Lunsford* was not applicable to the instant failure to maintain claim has no support whatsoever.

In addition to its inexplicable departure from *Lunsford*, the Commonwealth Court decided it would define "parts or appurtenances," substituting its judgment for that of this Court and 70 years of unbroken and uniform jurisprudence. Untethered from *Lunsford* and the jurisprudence defining parts and appurtenances, the Commonwealth Court held that the closing mechanism on the passenger door qualified as a part or appurtenance under the LIA

because it "serves a useful purpose and enhances safety." If "safety" on the train was a controlling factor the BIA would have so provided and courts would not be required to determine if an item is a part or appurtenance of a locomotive in accordance with *Lunsford's* analytical framework. This flawed analysis completely ignored the congressional intent behind the BIA and its focus on the hazards associated with locomotives and their operation. App. at 7a.

No court has ever concluded that a "part" located in a passenger car (or passenger compartment) is a "part or appurtenance" of a locomotive because it has a useful purpose and enhances safety.[9] This is for several reasons: (1) in 1936, *Lunsford* defined and set out the controlling test to determine whether a defective "part or appurtenance" is subject to the BIA; (2) a part located in a passenger compartment has nothing to do with the hazards that locomotives present; and (3) a part in a passenger seating area is beyond the scope of the BIA's statutory language, controverts Congressional intent supporting the passage of the BIA and, therefore, cannot be a trigger for strict liability. The only purpose of the door closing mechanism on the parlor door is to provide resistant tension on the passenger door. The Commonwealth Court's conclusion that the parlor door closer

[9] The useful purpose was passenger comfort. Notably, cases addressing claims under the LIA have not found that temperature controls are required in the operating cab. *Mosco v. Baltimore & Ohio Railroad*, *supra*, (protective devices for windows not a part or appurtenance); *Weaver v. Missouri Pacific Railroad*, *supra*, (air conditioners and screens are not a part or appurtenance).

enhances safety in the passenger compartment cannot be a basis for concluding that the door closer is a part or appurtenance within the meaning of the BIA.

Compounding its flawed reasoning, the Commonwealth Court analogized to cases that involved injuries to employees entering or exiting locomotives. App. at 8a. Bolden was injured entering a passenger compartment where he would collect tickets and fares from passengers. The Commonwealth Court opined that it found several "ingress/egress" cases persuasive.[10] The analogy to so-called "ingress/egress cases" provided another avenue, albeit erroneous, for it to ignore this Court's definition of parts and appurtenances and run counter to every case since the *Lunsford* decision.

Once these so-called "ingress/egress" cases are properly analyzed, it is clear that the items involved were parts or appurtenances *on* a locomotive and found to be integral or essential to the operation of the locomotive. None of the cases the Commonwealth Court found persuasive concerned parts or items that were unattached, unrelated or unconnected to the operation of the locomotive. A proper analysis of the cases that purported to provide authority for the Commonwealth Court's decision, reveals that each of the cases cited *Lunsford* or applied its analytical framework requiring the defective part or appurtenance to be "in fact" an integral or essential part of the locomotive.

---

[10] The Commonwealth Court's reference to "ingress/egress" cases is a categorization that is not found anywhere in the BIA/LIA jurisprudence.

It is noteworthy that the so-called "ingress/egress" cases present an internal inconsistency to the lower court's fundamental premise that the *Lunsford* test does not apply to failure to maintain equipment cases.[11] The Commonwealth Court's reliance on these failure to maintain cases (refuting its imposed limitation on *Lunsford*) is inexplicable; each of the claims were determined through application of

---

[11] The Commonwealth Court relied on the following: *Gowins v. Penn. R. Co.*, 299 F.2d 431 (6th Cir.), *cert. denied*, 317 U.S. 824 (1962)(involved a slippery walkway *on* the engine); *Bolan v. Lehigh Valley R. Co.*, 167 F.2d 934 (2nd Cir. 1948) (injury caused by a defective *pilot step affixed to the switching engine*); *Whelan v. Penn Central Co.*, 503 F.2d 886 (2nd Cir. 1974) (*injury on slippery switch engine floor board*); *Louisville & N.R. Co. v. Botts*, 173 F.2d 164 (8th Cir. 1949) (*injured on rear steps attached to engine*); *Delevie v. Reading Co.*, 176 F.2d 496 (3rd Cir. 1949) (gear mechanism above foot board ladder attached to engine for entry to locomotive); *Bankston v. Chesapeake & Ohio R. Co.*, 128 Ill. App. 3d 166, 470 N.E.2d 512 (Ill.App. 1 Dist. 1984) (*a catwalk at the cab door of a locomotive*) (emphasis supplied).

Unlike the present case, the facts in each of the failure to maintain cases that the Commonwealth Court relied on concerned: (1) *entering the engine from a ground ladder* attached to the locomotive; (2) injuries arising from *crossing a walkway on the engine*; and (3) injuries caused *by parts physically connected to the locomotive* (gear mechanism). Not one of these cases concerned entry to a passenger seating area. *See King v. Southern Pacific Transportation Co.*, 855 F.2d 1485 (10th Cir. 1988). The *King* court, citing *Lunsford*, observed that the cases holding railroads liable under the LIA for a failure to maintain, concern devices *on* the locomotive. The *King* court, unlike the Commonwealth Court, understood the Congressional intent supporting the passage of the BIA and that the BIA's remedial purpose was to eliminate the hazards of locomotive operation.

Lunsford's analytical construct that "*Whatever in fact is an integral or essential part of a completed locomotive* - - - are within the statute." (emphasis added). The Commonwealth Court's misguided analysis was the product of reasoning untethered to *Lunsford's* definitive interpretation of parts and appurtenances and its complete misunderstanding of the hazardous activity (locomotive operations) that the BIA sought to regulate through strict liability.

The Commonwealth Court's narrow view of *Lunsford* is contrary to the seminal decision of this Court defining the statutory meaning of parts or appurtenances; runs afoul of every BIA case decided after *Lunsford*; and critically, runs counter to Congressional intent demonstrating that the BIA was enacted to protect employees and others from the dangers inherent in operating a locomotive.[12]

---

[12] The Commonwealth Court's reliance on cases involving entering and exiting locomotives and finding them analogous to Mr. Bolden's claim because he was injured while entering a passenger area of a train demonstrates the lower court's superficial analysis completely devoid of statutory context. Absent from the decision below is any explanation for imposing strict liability for a defective part of a passenger compartment that is not associated with the inherent dangers in operating a locomotive. These dangers are expressed in the legislative history of the BIA, reiterated at the time of its amendment in 1915, and are implicit in the *Lunsford* decision, limiting the scope of strict liability for a defective part or appurtenance to the area (locomotive) of undue hazardous activity.

The bedrock flaw in the Commonwealth's court's reasoning was its failure to consider that the BIA was enacted to specifically address the hazards associated with the locomotive

(footnote continues)

V. Federal Railroad Regulations Recognize that the MU Cab and the MU Passenger Compartment are Separate and Functionally Distinct.

Despite the Commonwealth Court's attempt to justify its decision below, the absence of a coupling mechanism between the passenger compartment and the clearly delineated operating cab does not render the *Lunsford* analysis inapplicable. The Commonwealth Court's assertion that the parlor door is connected to the locomotive car ignores the structural separation and different functionality of the passenger compartment and the operating compartment of the MU car.

To underscore these salient and critical differences, the inspection and safety regulations promulgated by the Federal Railroad Administration, Department of Transportation (FRA) recognize the structural and functional differences of the passenger and operating compartments of the MU car. The Railroad Locomotive Safety Standards governing locomotives apply only to the MU operating cab and not to the MU passenger compartment. 49 C.F.R. 229.119. Part 229 explicitly states that a violation of

---

(footnote continued)

and its operation. If the Commonwealth Court examined the legislative history of the BIA, its amendment in 1915, and considered *Lunsford's* definitional focus, it would have understood that the BIA was intended to address, through strict liability, the hazards associated with locomotives. Consistent therewith, this Court in *Lunsford* ruled that BIA coverage may attach only if the defective part or appurtenance is integral or essential to the locomotive.

any of its requirements is a violation of the LIA. 49 C.F.R. 229.7.

In contrast, the inspection and safety regulations governing the passenger compartment of the MU car are found in the Passenger Equipment Safety Standards, 49 C.F.R. Part 238; 238.5. The safety and inspection regulations enacted in Part 238 do not impose liability under the LIA for a violation of its requirements further illustrating that the MU passenger compartment is beyond the scope of strict liability under the LIA.

VI. Certiorari Should Be Granted Because this Case Involves Matters of Substantial Public Importance.

This case involves a matter of significant public importance. If the decision below is allowed to stand, strict liability will attach to defective parts of a passenger car no matter how remote and insignificant to the activity associated with locomotives. Other jurisdictions may be inclined to find that a decision that has been affirmed by Pennsylvania's highest court is persuasive and also expand strict liability under the LIA. The LIA was not intended to cover a defective door closer in a passenger compartment nor would this Court's decision in *Lunsford* countenance such an unwarranted expansion of strict liability.

Strict liability under the BIA applies to the hazardous activity of operating a locomotive. Congress recognized this when it enacted the BIA in 1911. *See, Calabritto v. New York, New Haven & Hartford R.R.*, 287 F.2d at 398 ("the legislators were primarily concerned with boiler explosions"). The expansion of the Act to cover parts and appurtenances of a locomotive and its tender recognized that

remediating the hazards associated with operating a locomotive should also cover other parts of the locomotive. It was sensible and prudent to confine strict liability to boilers, locomotive tenders and their parts. The railroad can exercise unimpeded and exclusive control over this equipment and can take measures to control and eliminate the hazards associated with operating a locomotive.

Petitioner, however, does not have exclusive control over the passenger door. *See Urie v. Thompson*, 357 Mo. 738, 210 S.W.2d 98, 102-103 (1948), *rev'd on other grounds*, 337 U.S. 163 (1949)(railroad company is responsible for the general design, construction and maintenance of locomotives and tenders under its control). Unlike a boiler or a mechanical part of a locomotive which the carrier exclusively controls, the door closer in this case is located in a passenger area that is used by the public. Any passenger or other person that walks onto a train could tamper with or break the door closer. This could occur seconds before the now defective part causes an injury. Mr. Bolden's crew was not advised of any problem with the train or the door closer. As this case demonstrates, a carrier may have no opportunity to correct the problem or ensure that the item is safe before an employee or passenger is injured. The decision below burdens rail carriers with strict liability even though the part was not under its exclusive control and third parties could be responsible for the defect.

To expand LIA coverage to an area where conductors collect tickets from passengers eviscerates Congressional intent and the underlying purpose of the BIA. The rationale for imposing strict liability on a railroad for the malfunctioning of a locomotive was

to ". . . [cause] the lessening of boiler explosions" because the railroad will have the incentive to ensure that its boilers are safe. *Id.* Congressional focus in passing the BIA was to motivate carriers to take special precautions where *the* most dangerous railroading activities took place – the locomotive. The decision below renders insignificant parts in a passenger area, like the parlor door closer, an agent for strict liability.

To impose strict liability in this manner expands the scope of the BIA far beyond its intended purpose. Presently there are twelve commuter rail carriers operating approximately 2,500 MU cars.[13] If this erroneous decision remains uncorrected, Petitioner and other rail carriers that operate MU cars will be exposed to large damage claims from employees or passengers for injuries where it was not negligent or at fault.

The Commonwealth Court's decision is particularly troubling because MU cars operate in

---

[13] The following entities operate MU cars (either diesel or electric) on commuter rail lines: Massachusetts Bay Transportation Authority; Regional Transportation Authority (Chicago, Ill.); Metra (Chicago, Illinois); Northern Indiana Commuter Transportation District; Ft. Worth Transportation Authority; Dallas Area Regional Transportation Authority; Trinity Railway Express (Dallas/Ft. Worth); Tri-County Commuter Rail Authority (Florida); Connecticut Department of Transportation; Metropolitan Transportation Authority-Long Island Road (New York); Metropolitan Transportation Authority-Metro-North (New York); New Jersey Transit, and Southeastern Pennsylvania Transportation Authority-SEPTA (Philadelphia-Five County Area). According to American Public Transit Association there are approximately 2,500 MU cars currently in operation.

other jurisdictions adjacent to Pennsylvania, including New Jersey, New York and Delaware. Claims brought in federal court in those jurisdictions would presumably look to the federal interpretation of the LIA and, accordingly, dismiss any claim brought by a plaintiff who was injured in the same manner in which Mr. Bolden was injured. With Pennsylvania's highest court condoning and affirming a renunciation of this Court's controlling interpretation of a federal statute, other courts may choose to follow Pennsylvania or develop yet a different test to determine the meaning of "parts or appurtenances" under the LIA. The decision below presages a further splintering of the uniform interpretation of a federal statute that *Lunsford*, and all other federal and state courts, have established over the last 70 years.

It is clear that the Commonwealth Court's decision creates uncertainty and has a negative effect on interstate commerce. Petitioner's MU cars cross into Delaware and New Jersey. This means that a conductor who is injured in the same manner as Mr. Bolden on a similar MU car in New Jersey or Delaware could not maintain an LIA claim if federal law – *Lunsford* – was followed in those jurisdictions. Yet, a conductor injured due to a defective passenger door closer would be able to maintain a strict liability claim in Pennsylvania. Such an incongruous result was neither contemplated by *Lunsford* nor Congress when it enacted the BIA almost one hundred years ago. *See, U.S. v. Granderson*, 511 U.S. 39 (1990) (quoting *In Re Chapman*, 166 U.S. 661, 667 (1989)) ("[N]othing is better settled than a statute should receive a sensible construction, such as will effectuate the legislative intent, if possible, so as to avoid an unjust or absurd conclusion.").

The Pennsylvania Supreme Court's affirmance of the Commonwealth Court's decision cannot be allowed to stand. Public policy requires consistent interpretation of a federal statute especially one imposing strict liability.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

SAUL H. KRENZEL, ESQUIRE
Counsel of Record
Saul H. Krenzel & Associates
42 South 15th Street, Suite 800
Philadelphia PA 19102
(215) 977-7230

NICHOLAS J. STAFFIERI, ESQUIRE
General Counsel for Southeastern
Pennsylvania Transportation Authority
Legal Division, 5th Floor
1234 Market Street
Philadelphia, PA 19107
(215) 580-7450

Date: February 1, 2007

Appendix

[J-125-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LEONARD BOLDEN,	:	No, 12 EAP 2006
	:	
	:	Appeal from the Order of the
Appellee	:	Commonwealth Court
	:	entered on April 1, 2005 at
	:	No. 1361 C.D. 2004,
	:	affirming the Order of the
v.	:	Court of Common Pleas of
	:	Philadelphia County, Civil
	:	Division, entered on March
	:	16, 2084 at No. 1970 April
	:	Term, 1998
SOUTHEASTERN	:	
PENNSYLVANIA	:	
TRANSPORTATION	:	
AUTHORITY,	:	
	:	872 A.2d 230 (Pa. Cmwlth.
	:	2005)
Appellant	:	ARGUED: October 16, 2006

ORDER

PER CURIAM **DECIDED: November 3, 2006**

The Order of the Commonwealth Court is affirmed.

Judgment entered
Dated: November 3, 2006

/s/ John W. Person, Jr., Esquire
John W. Person, Jr., Esquire
Deputy Prothorotary

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LEONARD BOLDEN,	: No. 350 EAL 2005
Respondent	:
	: Petition for Allowance of
	: Appeal from the Order of
	: the Commonwealth Court
v.	:
SOUTHEASTERN	:
PENNSYLVANIA	:
TRANSPORTATION	:
AUTHORITY,	:
Petitioner	:

ORDER

PER CURIAM

AND NOW, this 29th day of March 2006, the Petition for Allowance of Appeal is granted. The parties are directed to address the following issue:

Whether the Commonwealth Court erred in affirming the trial court's decision that a door closing mechanism on a train is a "part and appurtenance" within the meaning of the Locomotive Inspection Act (LIA) in determining strict liability for an injury sustained by a railroad employee?

Madame Justice Baldwin did not participate in the consideration or decision of this matter.

TRUE COPY FROM RECORD

Attest: MAR 29 2006

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

In the Commonwealth Court of Pennsylvania

Leonard Bolden v. Southeastern Pennsylvania Transportation Authority, Appellant	No.: 1361 CD 2004

ORDER

NOW, May 17, 2005, having considered appellants application for reargument before the Court en banc, and appellee's answer, the application is denied.

BY THE COURT:

/s/ James G. Colins
James Gardner Colins
President Judge

Certified from the Record

MAY 17 2005

and Order Exit

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

Leonard Bolden	:	
	:	
v.	:	
	:	
Southeastern Pennsylvania	:	
Transportation Authority,	:	No. 1361 C.D. 2004
Appellant	:	Argued:
		February 28, 2005

BEFORE: HONORABLE JAMES GARDNER COLINS,
President Judge
HONORABLE BONNIE BRIGANCE
LEADBETTER, Judge
HONORABLE JOSEPH F. McCLOSKEY,
Senior Judge

OPINION BY PRESIDENT JUDGE COLINS
FILED: April 1, 2005

This case involves the Southeastern Pennsylvania Transportation Authority's (SEPTA) appeal from the orders of the Court of Common Pleas of Philadelphia County wherein SEPTA's motion in limine to exclude any reference to the Locomotive Inspection Act (LIA)[1] at trial was denied and a jury verdict was entered against SEPTA under the LIA. We affirm.[2]

Bolden worked as a conductor for SEPTA's regional

---

[1] 49 U.S.C. §20701 *et seq.*

[2] Construing the Law is a purely legal question; therefore, the Court's scope of review is plenary and the standard of review is error of law. *Wagner v. Wagner*, 465 Pa, 448, 768 A.2d 1112 (2001).

rail line on the R5 route running between Lansdale and Paoli when he was injured. The train Bolden was riding on left Suburban Station headed north to Lansdale and consisted of three cars. The cars were numbered 420, 419, and 402, with car 420 as the lead car, car 419 as the middle car, and car 402 as the rear car. Cars 420 and 402 were electronically propelled railcars capable of pulling the attached cars. Each of the three cars has two entrances separated from the passenger compartment by parlor doors, which serve to keep passengers out of the vestibule area while the train is in motion, as well as to keep in warm or cool depending on the weather. Each parlor door has a hydraulic closing mechanism attached to it that closes the doors automatically and also gives resistance to the door being opened. Upon reaching Lansdale, the train switched ends, meaning that car 402 became the lead car and car 420 became the rear car, with car 419 remaining in the middle. After the ends were changed, Bolden made his way to the now-lead car 402. Upon entering the vestibule between cars 419 and 402, Bolden attempted to enter the passenger compartment of car 402 through the parlor door. The parlor door's closing mechanism malfunctioned and did not provide the resistance as it normally would. The lack of expected resistance caused Bolden to fall and injure his shoulder as he attempted to exert the necessary force to open the door. Bolden's claim against SEPTA under the LIA is appealed to this Court.

LIA Section 2070 1 states,

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –

> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. §20701

At issue here is whether a door closing mechanism is a "part and appurtenance" within the meaning of the LIA. SEPTA argues that *Southern Ry Co. v. Lunsford*, 297 U.S. 398, (1936), controls the issue. In *Lunsford*, the U.S. Supreme Court held, "With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability." 297 U.S. at 402. Further, the Supreme Court stated, "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts and attachments definitely prescribed by lawful order of the Interstate Commerce Commission (ICC), are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not." *Id.* No one contends that the closing mechanism SEPTA employed here was experimental. Further, closing mechanisms are not mandated by any regulation of the ICC. In applying the language in *Lunsford*, the trial court reasonably distinguished that holding based upon factual differences between *Lunsford* and the present case. *Lunsford* clearly controls cases where experimental devices are used or carriers have

failed to install required equipment. The present case deals with a failure to maintain equipment that is useful and increases safety on a locomotive car, but is neither experimental nor required.

Under the relevant case law a parlor door closing mechanism was never held to be a "part or appurtenance" of a locomotive under the LIA. Nevertheless, the LIA was also never construed to exclude such closing mechanisms on parlor doors. Consequently, this Court must determine whether the trial court erred in holding that the closing mechanism is a "part and appurtenance" within the meaning of the LIA. The closing mechanism that failed in this case and led to Bolden's injury was located within the locomotive car at the time the injury occurred. Therefore, relief is potentially available under the LIA because of the closing mechanism's location on the locomotive. The closing mechanism serves a useful purpose and enhances safety. The prime purpose of the LIA is to enhance safety of employees and passengers.[3] Passing through such doors is necessary for

---

[3] *Lilly v. Grand Trunk Western Railroad Co.*, 317 U.S. 481, 486 (1943) ("The Act, like the Safety Appliance Act, is to be liberally construed in light of its prime purpose, the protection of employees and others by requiring the use of safe equipment")(internal citations omitted); *Urie v. Thompson*, 337 U.S. 163, 190 (1949) ("[W]e do not doubt that the prime purpose of the Boiler Inspection Act [now the LIA] was the protection of railroad employees and perhaps also of passengers and the public at large from injury due to industrial accident") (internal citations omitted); *Matson v. Burlington Northern Santa Fe Railroad*, 240 F.3d 1233, 1235 ("FELA and LIA are 'remedial and humanitarian' statutes that impose two separate types of liability to protect the safety of railroad employees") (citing *King v. S. Pac. Transp. Co.*, 855 F.2d 1485, 1488 n.1 (10th Cir. 1988)).

conductors such as Bolden to perform their duties. The closing mechanism was correctly found to be a "part and appurtenance" of the locomotive under the liberal construction of the LIA. The closing mechanism falls within the statutory language as a "part and appurtenance" that must be maintained "in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. §2070 1(1).

This Court finds persuasive a series of cases cited in Bolden's brief involving injuries that occurred to railroad employees entering and exiting locomotives. *Gowins v. Pennsylvania R. Co.*, 299 F.2d 431 (6th Cir.) (slippery walkways on engine), *cert. denied*, 371 U.S. 824 (1962); *Bolan v. Lehigh Valley R. Co.*, 167 F.2d 934 (2d Cir. 1948) (injury while attempting to board train using bent and worn step); *Louisville & N.R. Co. v. Botts*, 173 F.2d 164 (8th Cir. 1949) (injury after slipping on floorboard while mounting train); *Whelan v. Penn Central Co.*, 503 F.2d 886 (2d Cir. 1974) (ice on step assembly at rear of locomotive); *Bankston v. Chesapeake & Ohio R. Co.*, 470 N.E.2d 512 (Ill. App. Ct. 1984) (slippery catwalks on locomotive); *Delevie v. Reading Co.*, 176 F.2d 496 (3d Cir. 1949) (gear mechanism above footboard unsafe for access to cab). The foregoing cases are factually similar to the case at hand in that they involve a failure to maintain certain parts of a locomotive that are necessary for ingress and egress and were found to be covered by the LIA.

This Court notes SEPTA's extensive arguments that the *Lunsford* test of "integral or essential" was not applied by the trial court in determining whether the closing mechanism was a "part and appurtenance" under the LIA. We reject that argument on the ground that the trial court correctly distinguished the facts of this case from the *Lunsford* case's facts and holding.

Nevertheless, we do not believe that the closing mechanism would necessarily fail the *Lunsford* test. The door to which the closing mechanism is attached is clearly "integral or essential," for without it there would be no access for crew or passengers to the locomotive car while the train is moving. The closing mechanism itself serves only to enhance the safety and comfort of passengers and crew alike. Because the door is absolutely "integral or essential" and the closing mechanism makes the door safer to operate, it should fall within a liberal construction of the LIA and its purpose of enhancing safety under the *Lunsford* test at any rate. Therefore, even if the trial court erred, and we do not think it did, in not applying the *Lunsford* test, such error would be harmless.

Accordingly, we affirm.

/s/ James G. Colins
JAMES GARDNER COLINS, President Judge

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

Leonard Bolden	:	
	:	
v.	:	
	:	
Southeastern Pennsylvania	:	
Transportation Authority,	:	No.: 1361 CD 2004
Appellant	:	

ORDER

AND NOW, this 1st day of April 2005, the order of the Court of Common Pleas of Philadelphia County is affirmed.

/s/ James G. Colins
JAMES GARDNER COLINS, President Judge

RECEIVED APR 04 2005
RECEIVED MAY 04 2005

Certified from the Record
APR 01 2005
and Order Exit

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LEONARD BOLDEN, APPELLEE	:	**APRIL TERM, 1998**
V.	:	**NO.: 1970**
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, APPELLANT	:	**1361 CD 2004**

RECEIVED
04 AUG 16 PM
PRO PROTHY

RIZZO, J. **AUGUST, 2004**

OPINION

The Appellant, Southeastern Pennsylvania Transportation Authority ("SEPTA"), appeals two matters; first, an Order of the Court of Common Pleas of Philadelphia County, entered on October 11, 2003, reflecting a jury verdict for the Appellee under the Locomotive Inspection Act, and second, a Judgment Entered on the Verdict by the Appellee on March 16, 2004.

FACTS AND PROCEDURAL HISTORY

The Appellee, Leonard Bolden, was employed as a conductor by Appellant SEPTA from 1983 until 1999. (9/30/03 N.T. 43, 147). On August 14, 1997, the Appellee asserts that he injured his shoulder while working on a stationary Multi-Unit ("MU") Regional Rail R5 train. (9/30/03 N.T. 55). An MU may be

operated from either end (depending on the direction the train is headed) by means of engineering compartments. The MU in question was an electronically Propelled train consisting of three passenger cars (numbered 402, 419, and 420) with engineering compartments attached to each end of he train separated from the passenger compartments by parlor doors,

When the incident occurred the MU was inactive, conducting safety checks and "changing ends" in Lansdale. To change ends, the engineer moves from one engineering compartment to the other in preparation for a return trip in the opposite direction. Once the engineer relocated to the opposite end of the train in Lansdale during the morning on the day of the incident, the front car was number 402, the middle 419 and the end 420. The event prompting Appellee's original cause of action transpired when he entered car 402 by means of a parlor door leading from the vestibule separating cars 402 and 419. (9/30/03 N.T. 82-83). Appellee maintains that a closing mechanism on the rear parlor door of car 402 malfunctioned by failing to provide the standard resistance pressure. The closing mechanism consists of a hydraulic arm attached, on one end, to the parlor door and, on the other, to the frame of the door itself. (9/29/03 N.T. 56-57). This alleged defect caused the Appellee to lose his balance and fall, resulting in his claimed shoulder injury. While other members of the train's crew used the rear parlor door of car 402 without incident immediately following Appellee's fall, the door was later wedged open with a rock for the remainder of its route. Following the incident, the broken door closer was repaired.

This matter was first tried before a jury in July of

1999. On August 2, 1999, the jury rendered a verdict in favor of the Appellant with judgment being entered on that verdict by the Appellant on December 23, 1999. This judgment was appealed to the Commonwealth Court on January 13, 2000 and remanded for a new trial on January 30, 2000. The trial was scheduled for a December 2002 date but was rescheduled on December 18, 2002 for March 2003. The matter was then continued twice, first on March 17 and then again on June 1, with an ultimate date of trial set for September 29, 2003. Trial commenced before this Court on the aforementioned date with the cause of action brought under the Federal Employer's Liability Act (hereinafter referred to as "FELA"). On October 11, 2003, the Court entered an Order reflecting a jury verdict in favor of the Appellee. Appellant filed a motion for post trial relief from this Court on October 16, 2003 seeking Judgment Notwithstanding the Verdict. On March 16, 2004, the Appellee entered Judgment on the Verdict.[1] On March 30, Appellant gave Notice of Appeal to the Superior

[1] Much to the dismay of this Court, Appellee entered judgment in this matter just two days before oral argument was scheduled for post-trial motions on issues which form the bases of the instant appeal. The ultimate date selected for oral argument was made as an accommodation for BOTH parties based on prior requests for continuances on either post-trial briefing deadlines and/or previously scheduled hearing dates. Reasons cited for the requests were based on personal matters as well as professional conflicts. In this instance, the courtesy of the Court extended in granting such continuances was met by discourtesy from Appellee's counsel in depriving this Court the opportunity to hear necessary oral argument on the significant issues now on appeal. Such a hearing would possibly have been of great assistance to either narrow the issues on appeal or resolve the matter altogether.

Court. An Order on March 31, 2004 compelled Appellant: to issue a Statement of Matters Complained of on Appeal. Appellant complied on April 14, serving the Statement of Matters on the Court. On May 6, 2004 the Superior Court transferred Appellant's appeal of the present adjudication to the Commonwealth Court.

ISSUES ON APPEAL

Pursuant to the Pennsylvania Rules of Appellate Procedure, Appellant served on this Court and Appellee's counsel a Statement of Matters Complained of on Appeal.[2] The the matters referenced focus on the following central issues[3]:

1. Whether the Trial Court erred, as a matter of law, in allowing the Plaintiff's claims to proceed to the jury under the Locomotive Inspection Act (hereinafter referred to as "LIA").

    a. Whether the Trial Court erred, as a matter of law, in deciding that the Plaintiffs injuries occurred due to a defective part or appurtenance of a locomotive "because the evidence does

---

[2] See Exhibit "A" for a full Statement of Matters.

[3] It is noted that the Appellant also maintains that "[t]here is no violation, or alleged violation, of an applicable regulation promulgated by the Federal Railroad Administration which would support liability against SEPTA under the LIA." Upon investigation of the associated regulatory law, this Court agrees that there exists no applicable regulation to support a finding of liability under the LIA. Also, the Appellee fails to contend that liability under the LIA is founded on such regulations. Therefore, further discussion as to this issue is not necessary and is omitted.

not, and could not, support [such] a finding."

b. Whether the Trial Court erred in applying the Locomotive Inspection Act because doing so is "contrary to the policy underlying the doctrine of strict liability."[4]

DISCUSSION

I. A PARLOR DOOR ON A MULT-UNIT QUALIFIES AS A "PART OR APPURTENANCE" OF A "LOCOMOTIVE" UNDER THE LOCOMOTIVE INSPECTION ACT.

The Locomotive Inspection Act applies to locomotives and the parts and appurtenances thereto.[5] 49 U.S.C.A § 20701 (2004). As a precursor to the LIA, Congress, in 1911, enacted the Boiler Inspection Act (hereinafter referred to as "BIA") to protect railroad employees and passengers from the hazards of accidental boiler explosions. Cong. Rec. H2072 (daily ed. Feb. 7,1911) ("It is of the highest importance that every practicable means be adopted for guaranteeing

---

[4] The Statement of Matters Complained of on Appeal did not include the FELA but rather the applicability of the LIA. However, the present action was initiated under the FELA because the LIA does not provide for an independent cause of action. Any party attempting recovery pursuant to the LIA must bring a cause of action under the FELA.

[5] The exact pertinent text of the LIA is as follows:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances (1) are in proper condition and safe to operate without unnecessary danger of personal injury . . .

U.S.C.A § 20701.

safety to operatives and to passengers."). The original law covered only locomotive engines, rather than the locomotive as a whole.[6] 45 U.S.C.A § 23 (repealed 1994). The Congressional Record illustrates that the BIA was a remedial statute, intended "to protect the lives and limbs of railway employees." Cong. Rec. H2071 (daily ed. Feb, 7, 1911). Later, in a 1915 amendment to the BIA, Congress extended the act to cover the entire Locomotive.[7] Cong. Rec. H5355 (daily ed, March 3, 1915). This extension likewise applies to the 1994 codification of the LIA. 1994 U.S.C.C.A.N. 916, 917.

Appellant argues that a parlor door, located at the rear of a train car connected to the operating cab, does not fall within the purview of the LIA because its closing mechanism is not an appurtenance of the locomotive. In examining the terms "locomotive" and "part or appurtenance" within the context of the BIA and the LIA, this Court will use the recognized approach to statutory interpretation which includes an inquiry into the following three areas: (1) Stated statutory purpose; (2) Text of the statute; (3) Judicial interpretation of the statute.

Turning first to the stated statutory purpose,

---

[6] Interestingly, however, the dialogue from the 1911 passage seems to contemplate coverage of the entire locomotive rather than just the boiler: "we [are] here putting a penalty upon the railway companies if their *locomotives* [are] found to be in a certain condition" Cong. Rec. S730 (daily ed. Jan. 10, 1911) (emphasis added).

[7] The exact language, explaining the purpose of the amendment, is as follows: "[i]t proposes an amendment to the boiler-inspection law, which contemplates the inspection of the entire locomotive." Cong. Rec. H5355 (daily ed. March 3, 1915).

unfortunately, the relevant legislative history surrounding the LIA fails to provide definitions for the terms "locomotive" and "part or appurtenance." 1994 U.S.C.C.A.N. at 916-17. Congress merely stated that the LIA was to function as a clear restatement of the principles previously found in the BIA.[8] Id. Turning to the BIA, examination of the legislative histories from its 1911 passage and subsequent amendments does not resolve the issue because those histories are also void of any discussion as to what qualifies as a "locomotive" or a "part or appurtenance" thereto. Cong. Rec. H2071 (daily ed. Feb. 7, 1911); Cong. Rec. H5355 (daily ed. March 3, 1915); Cong. Rec. S11124 (daily ed. June 7, 1924). Though the Congressional Record from 1911 to 1994 clearly states the intent of Congress for the BIA (and later the LIA) to extend to the entire locomotive and its appurtenances, the same Record fails to offer any definition for the word "appurtenance".[9]

Finding no guidance from Congress as to what it intended the phrase "locomotive . . . and its parts and appurtenances" to mean, this Court will now investigate case law and common definitions to discern the will of Congress. 49 U.S.C.A § 20701 (2004).

---

[8] Because the LIA did not substantively alter the BIA, this Court will apply cases arising under both the LIA and the BIA to the current appeal. This application of BIA case law to cases arising under the LIA has been embraced by other jurisdictions.

[9] "A studious examination of the proceedings and debates of Congress . . . fails to throw any light whatsoever on the question [of what is an appurtenance]" Brown v. Lehigh Valley R.R. Co., 108 N.Y. Misc. 384, 390 (1919).

A. THE FORWARD CAR ON A MULTI-UNIT TRAIN CONTAINING BOTH OPERATING AND PASSENGER COMPARTMENTS IS A LOCOMOTIVE UNDER THE LOCOMOTIVE INSPECTION ACT.

A locomotive is commonly defined as "a machine that moves about by operation of its own mechanism." Merriam-Webster Online Dictionary, *Locomotive*, http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=locomotive (accessed June 8, 2004).[10] This definition is supported by case law classifying a locomotive as any self-propelled vehicle operating on railroad tracks and performing a locomotive function. Holfester v. Long Island Railroad Co., 360 F.2d 369, 372 (2nd Cir. 1966) (supporting a jury finding that a self-propelled mail and baggage car qualified as a locomotive under the BIA because there was a sufficient evidentiary basis for the finding)[11]; Garcia v. Burlington Northern Railroad Co., 818 F.2d 713, 715 (10th Cir. 1987) (finding that a locomotive is any motor car "used to push or pull any other car along the railroad tracks"); Duchsherer v. Northern Pacific Railway Co., 4 Wash. App. 291, 294 (1971) (finding a self-propelled motorcar to be a locomotive under the BIA).

Under such a definition, in the instant case, car 402 qualified as a locomotive at the time of the

---

[10] This definition is used by the Court due to the absence of any statutory or otherwise legal definition.

[11] Holfester is of particular relevance because the car at issue is car 402 in that each car had the dual both purposes of both propelling the train and transporting objects. In Holfester the objects were mail and baggage, while in this case the "objects" were primarily persons. 360 F.2d 369.

accident because it was a self-propelled passenger car situated on railroad tracks and ready to engage in a locomotive function of pulling two other train cars.[12] Appellant argues that a locomotive should be limited to only the operating compartment of a train car. Def.'s Memorandum in Support of its Motion for Post Trial Relief 7 (December 31, 2003). As discussed above, this narrow construction is not supported by either relevant case law or the plain definitional meaning of the term locomotive.

Furthermore, additional investigation into the meaning of the word "cab" proves illustrative for support of a broader reading of the term locomotive. A "cab" is defined as "the part of a locomotive that

---

[12] While it is true that the multi-unit train was not actually in transit at the time of the accident, the train was "in use" as per the LIA and had completed "changing ends," with car 402 replacing car 420 as the lead car and locomotive of the train. Haworth v. Burlington Northern and Santa Fe R. Co., 2003 WL 22129467 (E.D.Wash.) (finding a train to be in use as long as it is "in its final predeparture stages, and being neither serviced nor repaired." The engineer had completed all tests on the operating components and the train was to momentarily make its return trip. Therefore, the train qualified as being in use under the LIA). Car 402 was ready to make the return "run" and the engineer had already completed his tests on the braking systems and other operating components, making car 402 the locomotive of the multi-unit train. 9/29/03 N.T. 50-53. Additionally, it is perfectly logical to find that a locomotive exists on a non-moving train. While a passenger-train is "running," it interrupts service at multiple stations to allow passengers to enter and exit the train. These minor stoppages are indistinguishable from the one existing when Appellee's accident occurred because in each, the trains would be in pre-departure stage with the cabs readied for operation. Therefore, at the time of the accident, car 402 was "in use" as the locomotive of the train.

houses the engineer and operating controls."[13] Merriam-Webster Online Dictionary, *Cab*, http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=cab (accessed June 8, 2004) (emphasis added). This definition contemplates a locomotive consisting of both operating and non-operating components and supports a finding that a car containing an engineering cab and a passenger cabin is a "locomotive." In addition to this definition, the Court is also persuaded to give the term "locomotive" a broad reading because of the remedial nature of the LIA, compelling a liberal construction of the act. Urie v. Thompson, 337 U.S. 163, 181-82 (1949). Absent any conflicting instruction from Congress, it was proper for this Court to deem car 402 a "locomotive", the defective door closer a part thereof, and allow Appellee to pursue recovery under the LIA.[14]

---

[13] In the current case, the engineer of the train affirmed that car 402 consisted of two compartments, a cab containing the propulsion controls, and a "coach" section, (9/29/03 N.T. 52).

[14] A "part" is defined as "one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitute the whole." http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=part (accessed June 8, 2004). Finding a lack of any alternate Congressional definition for "part" in connection with the LIA, the Court is persuaded to adopt this common definition. Accordingly, the door closing mechanism clearly qualifies as a "part" of the locomotive because the mechanism, together with other objects contained within car 402, constitute a multi-unit car in its entirety.

B. UNDER THE PLAIN MEANING OF THE WORD APPURTENANCE, A PARLOR DOOR ON A CAR ADJACENT TO AN OPERATING CAB IS APPURTENANT TO A LOCOMOTIVE.

This Court is satisfied that car 402 was a locomotive, and the door closing mechanism a part of that locomotive, thereby permitting recovery under the LIA, However, the Appellant contends that only the operating cab of car 402 was a locomotive (instead of the entire car) and that the door closer was not an "appurtenance" of said locomotive, thereby precluding recovery under the LIA. Assuming contrary to the Court's findings, that Appellant's definition of locomotive is correct, the door closer qualifies as an appurtenance of the operating cab and therefore recovery is still authorized under the LIA.

Finding no contrary definition for "appurtenance" in the Congressional Record, it is logical for this Court to assume that Congress intended the word to be given its common and normal meaning. Dictionaries define an appurtenance to be an adjunct or annexed part of another object. Black's Law Dictionary 41 Bryan A. Garner ed., 2nd Pocket ed., West 2001; Merriam-Webster Online Dictionary, *Appurtenance*, http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=appurtenance (accessed June 8, 2004). This is supported by case law defining an appurtenance as "a thing . . . belonging to, accessory, or incident to some other thing." Brown, 108 N.Y. Misc. 395 (Appurtenance language was used in original BIA to extend coverage from boiler to entire locomotive. Though a 1915 amendment to the BIA similarly

extended the BIA to the entire locomotive, the cause of action in Brown accrued before the amendment took effect. Thus, Brown used the word appurtenance to increase the previously accepted scope of the BIA). Assuming, as the Appellant argues, that the locomotive consisted of only the forward most operating compartment of the multi-unit train, these definitions still allow for a parlor door of a lead passenger car to be considered an appurtenance to the locomotive because it is an appendage and accessory of the operating compartment

The rear door to the car qualified as "belonging to" the operating compartment because both the operating compartment and the front passenger section (to which the parlor door in question was attached) were part of a unit known collectively as car 402. The operating compartment was not joined to the passenger section by use of couplers or any other connecting device. Rather, the two were permanently joined as a singular self-propelled unit and therefore, a door from the passenger compartment was an appendage "belonging to" the operating compartment.[15] Finally, the remedial nature of the LIA supports a liberal reading of the word appurtenance, and lends support to this Court's finding that a door closing mechanism qualifies as an

[15] For further support that the door functioned as an accessory to the operating compartment, it was the common practice of the train crew to use passenger compartment parlor doors as entrances to the "coach" portions of the front train car for sitting while in the process of changing ends. (9/29/03 N.T. 52). In fact, the engineer testified at trial that he was seated in the coach section of car 402 at the time of the Appelle's accident. Id.

"appurtenance" under the act.[16]

C. CASE LAW OFFERED BY APPELLANT LIMITING THE DEFINITION OF AN "APPURTENANCE" IS DISTINGUISHABLE AND NOT PERSUASIVE TO THIS COURT.

Cases offered by the Appellant establishing a definition of appurtenant locomotive components as those that are integral or essential parts of a completed locomotive are not compelling because their holdings are limited to situations factually distinct from the current action before this Court. The initial case announcing the "integral or essential" language did so in the context of an experimental device placed on a locomotive. Southern Ry. Co. v. Lunsford, 297 U.S. 398, 402 (1936). While the Appellant contends that Lunsford stands for the general proposition that to qualify as an appurtenance to a locomotive an object must be essential or integral to the completed locomotive, an examination of Lunsford's holding in context is illustrative:

> it cannot be said that Congress intended that every gadget placed upon a locomotive . . . for

---

[16] This Court's finding is substantiated by case law that deems "appurtenances" to include a myriad of other objects attached to or associated with a locomotive. These objects include: warning torpedoes (Chicago v. Speth, 404 F.2d 291); a "lifting eye" (Southern Railway v. Bryan, 375 F.2d 155); a fuse box (Holfester v. Long Island Railroad, 360 F.2d 369); a locomotive platform (Calabritto v. New York Railroad, 287 F.2d 394); an engineer's seat (Heiselmoyer v. PA Railroad, 243 F.2d 773); a foot board (Louisville & Nashville Railroad v. Botts, 173 F.2d 164); an automatic bell ringer (Hines v. Smith, 275 F. 766); a radio (Green v. River Terminal Railway, 585 F.Supp. 1019); and a push-pole (Zollinger v. Pittsburgh & Lake Erie Railroad, 337 F.Supp. 913).

> *experimental* purposes, should become part thereof within the [BIA] . . . Whatever in fact is an integral or essential part of a completed locomotive . . . [is] within the [BIA]. But mere *experimental* devices . . . are not.

Id (emphasis added).

This more complete reading of the appurtenance definition from Lunsford is supported by subsequent case law holding that the "precise holding in Lunsford . . . was that an *experimental* device that had been installed on a locomotive by the railroad was not a 'part and appurtenance.'" Marshall v. Burlington Northern Inc., 720 F.2d 1149, 1152 (9th Cir. 1983) (emphasis added); Zollinger v. Pittsburgh and Lake Erie R.R. Co., 337 F. Supp. 913, 914 (W.D.Pa. 1972) (distinguishing the use of a push-pole, in operation since 1906, from Lunsford - "This last factor distinguishes [Lunsford] in which the device in question was new and experimental, designated as a 'gadget' by the court"). Appellant argues that the holding from Lunsford was extended in Herold v. Burlington Northern Inc. to cases outside of the experimental context. 761 F.2d 1241 (8th Cir, 1985). While Herold does reference Lunsford, it does so only for a summary of a railroad carrier's duty under the BIA and to identify Lunsford as limited to cases involving experimental devices. Id at 1245-1246 ("[Lunsford] held it was not an appurtenance; not because the device was not required by the [Interstate Commerce Commission] but rather because the device was experimental"). Instead of relying on the "integral or essential" language from Lunsford, the court found that the device at issue (an amber beacon attached to the locomotive) was an appurtenance based on an extensive listing of other items on locomotives that

were deemed to be appurtenances by various courts. Id at 1246-1247 (citing extensive list of objects that other jurisdictions found contained within the LIA).

The only extension of the "integral or essential" requirement for appurtenances outside of the experimental context involves the failure to install components on trains. Mosco v. Baltimore & Ohio R.R., 817 F.2d 1088, 1091 (4th Cir. 1987) (noting that "we derive the rule that a carrier cannot be held liable under the Boiler Inspection Act for *failure* to install equipment on a locomotive unless the omitted equipment. . . constitutes an integral or essential part of a completed locomotive") (emphasis added); McGinn v. Burlington Northern Railroad Co., 102 F.3d 295, 299 (7th Cir. 1996) (finding railroad not liable under the BIA for failure to install luggage racks in engine cab); King v. Southern Pacific Transportation Co., 855 F.2d 1485, 1488-89 (10th Cir. 1988) (holding that a lack of armrests on seats was not covered under the BIA because the armrests were not integral or essential parts of the completed locomotive); Gardner v. CSX Transportation, Inc., 201 W.Va. 490, 497 (1997) (finding that missing seat belts, armrests and hinges of cab seats were not integral or essential parts of the locomotive). Appellant offers these cases to support its assertion that the door closer must be integral or essential to the completed locomotive in order for it to be an appurtenance thereto. This case law is not persuasive, however, because the accident in the instant case occurred due to a defect in an already existing mechanism, rather than an injury caused by the absence of such a mechanism. Therefore, the "integral or essential" definition required for recovery in the aforementioned failure to install context is not applicable to the instant case.

The Appellant offers only one case besides the distinguishable "integral or essential" decisions in support of its assertion that the door closing mechanism is not an "appurtenance". Def.'s Memorandum in Support of its Motion for Post Trial Relief at 10; Varney v. Norfolk and Western Railway Co., 899 F. Supp. 280, 282 (S.D. W. Va. 1995). In Varney the court precluded recovery under the BIA when a radio had been removed from a locomotive and was in transit to another locomotive, finding that the broken strap on the radio did not create an unnecessary risk. 899 F. Supp. at 281-282. Appellant claim that Varney mandates that the door closing mechanism not be labeled an appurtenance of the operating component. Appellant misconstrues the court's finding in Varney: "In addition, the Court finds, as a matter of law, that *when the radio was detached from its casing and in transit* to another locomotive, it was no longer a part or appurtenance of the locomotive for purposes of liability under the Boiler Inspection Act." Id at 282 (emphasis added).

The present action is clearly distinguishable from Varney because the door closing mechanism was never detached from its original location nor was it in transit to any other locomotive. The "appurtenance" holding in Varney is limited to a very fact specific situation not present before this Court. We are not persuaded to apply the holding from Varney, and instead adopt the plain meaning of the term "appurtenance," believing it to be more congruent with the intent of Congress.[17]

---

[17] Furthermore, the specific language offered in the Varney holding seems to indicate that had the radio *not* been removed and in transit, that it could have constituted an "appurtenance" of the locomotive.

Accordingly, even accepting Appellant's definition limiting the locomotive to only the front operating compartment, the door closing mechanism is an appurtenance to the operating compartment and therefore falls within the purview of the LIA.

II. APPLYING THE LOCOMOTIVE INSPECTION ACT TO THE CURRENT SITUATION IS NOT CONTRARY TO THE POLICY UNDERLYING THE DOCTRINE OF STRICK LIABILITY.

Appellant claims that the finding that a door closing mechanism is covered under the LIA is contrary to the policy underlying the doctrine of strict liability, however, appellant fails to offer any legal precedent to direct this Court that permitting recovery under the LIA would be inappropriate within the confines of strict liability. Def.'s Memorandum in Support of its Motion for Post Trial Relief at 11-13. First, Appellant asserts that "The rationale for strict liability is that the *boiler* constituted a part of a locomotive that was inherently dangerous and a malfunction in the boiler was something outside of the control of the employee." Id at 12 (emphasis added). This statement has no basis as the LIA (and even the amended form of the BIA) is not limited to only the boiler of a locomotive, but rather covers the entire locomotive and all parts and appurtenances thereto. Furthermore, Congress made clear that it intended the principles of strict liability to extend to situations beyond boiler explosions. Cong. Rec. H5355 (daily ed. March 3, 1915) (stating that the 1915 amendment to the BIA "contemplates the inspection of the entire

locomotive").[18]

Appellant next contends that the LIA should not be applied because a defective door closer is not an "unnecessary danger" or "ultrahazardous activity" and that application of the LIA would therefore be contrary to the doctrine of strict liability. While it is true that a defective door closing mechanism might not constitute an "ultrahazardous activity" in the sane way that explosions and other inherently dangerous occurrences do, the door certainly poses an unnecessary danger to the railroad workers and passengers when it is in a defective and broken condition. The magnitude and scope of the danger involved in the instant case was within the discretion of the jury to find as a question of fact. Louisville & Nashville Railroad v. Botts, 173 F.2d 164, 166. With a verdict for the Appellee at trial, it is apparent that the jury found that the broken door closing mechanism constituted an unnecessary danger, warranting

---

[18] Associated text of the legislative history supports this conclusion. In it, Senator Robinson notes that the amendment would have the "boiler inspection . . . made by persons who have had five years practical experience in boiler making, and that the inspection *of the remainder* of the locomotive shall be made by a person who has had practical experience in the construction and operation of locomotives." Cong. Rec. H5355 (daily ed. March 3, 1915) (emphasis added). This discussion, which contemplates the creation of two separate inspectors, clearly shows that the amendment was meant to extend coverage of the original BIA beyond the boiler and to the entire locomotive. Also, of note, Congress did not limit the BIA (and the LIA) to situations outside the control of the employee. Appellant points to no statutory language or text from the Congressional Record to support its assertion and this Court fails to find any such support in either source.

coverage within parameters of the LIA.

Furthermore, the argument advanced by the Appellant that if the defective door were "meant to be covered by the doctrine of strict liability, like a boiler explosion, there would not be a situation where an employee could subsequently operate the equipment involved in the incident without a problem" is unsupported. Def.'s Memorandum in Support of its Motion for Post Trial Relief at 12. The Appellant does not provide any technical basis supporting the assumption that all boiler explosions would render the boiler inoperable.[19] In the absence of such technical data, logic would permit the view that it is entirely possible to use a boiler following an explosion, provided the explosion is not large enough to render the entire boiler inoperable.

Finally, Appellant claims that because the Appellee "could have prevented the accident by his own conduct" the underlying policy of strict liability found in LIA would be violated if it were applied to the current situation. Besides a failure to again legally substantiate this assertion, Appellant's argument clearly relies on a consideration of contributory negligence, which is not permitted as a defense to a finding of strict liability under the LIA. Haworth, 2003 WL 22129467 (finding that because Defendant liable under the LIA that they were "precluded from

[19] Also, the Appellant fails to offer any case law supporting the conclusion that use of an object following an accident renders the object outside the purview of the LIA. To the contrary, nothing in the established case law indicates that courts have precluded recovery under the LIA in situations where the equipment involved in the incident remained operable subsequent to the accident causing the injury.

asserting contributory negligence as a defense"). In sum, the LIA itself precludes the consideration of the exact situation (contributory conduct of the Appellee) that the Appellant argues should limit its application.

CONCLUSION

Based on the aforementioned, the Trial Court properly allowed the fact-finder to determine liability issues under the Locomotive Inspection Act, as there were no legal or policy reasons to limit application of the Locomotive Inspection Act under the current factual circumstances. Wherefore, the Trial Court's ruling was proper and should be affirmed.

BY THE COURT

/s/ Annette M. Rizzo J.

ANNETTE M. RIZZO

COPIES SENT
PURSUANT TO Pa.R.C.P.236(b)

AUG 16 2004

FIRST JUDICIAL DISTRICT OF PA
USER I.D.: /s/ DML

This Page Intentionally Left Blank

COMMON PLEAS COURTS OF PHILADELPHIA
CIVIL LISTING SECTION
TRIAL WORK SHEET

Event:_____, at__/__/__ __ : in _____ Scheduled:__/__/__ JURY		JE – MAJOR JURY-EXPEDITED		
Judge's Name: Annette M. Rizzo			Signature: X /s/ Annette M. Rizzo	
Caption: BOLDEN VS SEPTA				Case Type: 2F PERSONAL INJURY – FELA
Term and Number: 199804-01970	If Consolidated: Term and Number(s)			
TRIAL DATE: 9/26/03	ACTUAL: (x) JURY ( ) NON-JURY	TOTAL AMOUNT $460,000.00	NUMBER OF DAYS 10	DATE SHEET PREPARED 10/11/03
Disposition Date: 10/10/03				

DOCKETED
OCT 20 2003
F.CLARK
CIVIL ADMINISTRATION

FULL DESCRIPTION OF DISPOSITION (To Be Entered VERBATIM On The Docket):
Jury verdict in favor of Plaintiff, Leonard Bolden and against defendant Southeastern Transportation Authority in the sum of $460,000.00, under the "Locomotive Inspection Act".

Default Judgment/Court Ordered
Dispositive Motion Granted
Directed Verdict
Discontinuance Ordered
Discontinue/Transfer Binding ARB

Finding For Defendant
Finding For Plaintiff
Damages Assessed

Judgment Entered By Agreement
Judgment Entered

(x) Jury Verdict For Plaintiff
( ) Jury Verdict For Defendant
( ) Mistrial
( ) Hung Jury

( ) Non-Pros Entered
( ) Non-Suit Entered

COPIES SENT
PURSUANT TO Pa.R.C.P.236(b)
OCT 15 2003
FIRST JUDICIAL DISTRICT OF PA
USER I.D.: /s/ DML

( ) Settled Prior To Assignment For Trial
(Team Leaders, only)
( ) Settled After Assignment For Trial
( ) Transferred To Other Jurisdiction

( ) Other (Explain) _____

Supreme Court, U.S.
FILED
FEB 13 2007
OFFICE OF THE CLERK

No. 06-1095

In The

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Petitioner,

v.

LEONARD BOLDEN,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION OF RESPONDENT LEONARD BOLDEN

WILLIAM L. MYERS, JR., ESQUIRE
Counsel of Record

MYERS LAFFERTY LAW OFFICES, P.C.
Suite 810
1515 Market Street
Philadelphia, PA 19102
(215) 988-1229

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Has the Petitioner failed to present a compelling reason for the Court to grant certiorari to review the Pennsylvania appellate courts' application of the *Lunsford* test to the facts of this case given that:

A. The Factual Record Supports the Pennsylvania Courts' Finding That the Locomotive Component in Question Was "Integral or Essential";

B. The Pennsylvania Courts' Finding Was Consistent With the Humanitarian Purpose and Broad Construction of the Boiler and Locomotive Inspection Acts (BIA/LIA); and

C. The Pennsylvania Courts' Finding Was Consistent With This Court's Holding in *Lunsford* and with the Post-*Lunsford* Decisional Law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. Petitioner's Dissatisfaction With the Pennsylvania Courts' Application of *Lunsford* Does Not Warrant Certiorari 4

A. The Factual Record Supports the Finding That The Locomotive Door and Closing Mechanism Were "Integral or Essential" 5

B. The Pennsylvania Courts' "Integral or Essential" Finding Is Consistent With the Humanitarian Purpose and Broad Construction of the BIA/LIA 6

II. The Pennsylvania Courts' Decision Does Not Conflict With This Court's Holding in *Lunsford* 7

III. The Pennsylvania Decision Aligns Squarely With The Post-*Lunsford* Distinction Between Failure-to-Maintain and Failure-to-Install Cases 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bankston v. Chesapeake & Ohio R. Co., 128 Ill.App.3d 166, 470 N.E.2d 512 (Ill.App. Dist. 1984) 7

Bolan v. Lehigh Valley R. Co., 167 F.2d 934 (2nd Cir. 1948) 7

Duchsherer v. Northern Pacific Ry. Co., 4 Wash.App. 291, 481 P.2d 929 (1971) 7, 11

Fontaine v. National Railroad Passenger Corp., 63 Cal.Rptr.2d 644, 54 Cal.App.4th 1519 (Cal.App.3. Dist. 1997) 7

Gardner v. CSX Transportation, Inc., 201 W.Va. 490, 498 S.E.2d 473 (1997) 9, 10

Green v. River Terminal Railway Co., 585 F.Supp. 1019 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1987) 10, 11

Herold v. Burlington Northern, Inc., 761 F.2d 1241 (8th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985) 5, 7, 10, 11

Hubbard v. National Railroad Passenger Corp., 2004 WL 1977646 (Mich.App. 2004) 11

King v. Southern Pacific Transportation Co., 855 F.2d 1485 (10th Cir. 1988) 9, 10

Lilly v. Grand Trunk Western Ry. Co., 317 U.S. 481 (1943) 6

McGinn v. Burlington Northern Railroad Co., 102 F.3d 295 (7th Cir. 1996) 10

Missouri Pacific R. Co. v. Brown, 862 S.W.2d 636 (Tex.App. 1993) 7

TABLE OF AUTHORITIES – Continued

Page

Mosco v. Baltimore & Ohio Railroad, 817 F.2d 1088 (4th Cir.), *cert. denied,* 484 U.S. 851 (1987) 9

Palmer v. Union Pacific R. Co., 12 F.Supp.2d 588 (S.D. Tex. 1998) 7

Reed v. Norfolk Southern Ry., 312 F.Supp.2d 924 (N.D. Ohio 2004) 9

Seaboard Coast Line Railroad Co. v. Jackson, 256 So.2d 568 (Fla.App. 1971), *cert. denied,* 409 U.S. 1001 (1972) 7, 10, 11

Southern Railway Co. v. Bryan, 375 F.2d 155 (5th Cir. 1967), *cert. denied,* 389 U.S. 827 (1967) 7

Southern Railway v. Lunsford, 297 U.S. 398 (1936) ....*passim*

Spade v. CSX Transp., Inc. 2004 WL 2980740 (W.D. Mich. 2004) 10

Urie v. Thompson, 337 U.S. 163 (1949) 6

Whelan v. Penn Central Company, 503 F.2d 886 (2nd Cir. 1974) 7

Zollinger v. Pittsburgh and Lake Erie RR Co., 337 F.Supp. 913 (W.D. Pa. 1972) 7, 11

MISCELLANEOUS

Supreme Court Rule 10 3

COUNTER-STATEMENT OF THE CASE

This case involves career-ending injuries sustained at work on August 14, 1997 by Respondent Leonard Bolden on a SEPTA MU Locomotive. The MU Locomotive is an integrated locomotive and passenger vehicle. It is self-propelled, and is constructed with an engineer's section conjoined to the passenger area, akin to the front and back seats of an automobile.[1]

Mr. Bolden was injured by a malfunctioning vestibule door mechanism on the MU Locomotive. MU Locomotive doors like the one that injured Mr. Bolden are not new or experimental, but are found on most of Petitioner's regional rail lines.

The vestibule door is integral to the operation of the locomotive; both passengers and crew members use the door to enter and exit the locomotive. Mr. Bolden and fellow crew member Deidra Rich used the door to enter the locomotive on the day of the injury. The vestibule door also provides access to the engineer section through the passenger section.

The vestibule door serves the *safety function* of keeping passengers out of the vestibule while the train is moving. By closing automatically, the vestibule door also

---

[1] As correctly stated by the trial court:

> *The operating compartment* was not joined to the *passenger section* by use of couplers or any other connecting device. Rather, the two *were permanently joined as a singular self-propelled unit* and therefore, a door from the passenger compartment was an appendage "belonging to" the operating compartment.

(Petition for Certiorari, Appendix 22a) (emphasis added).

serves the passenger comfort and safety functions of retaining heat and air conditioning.

Like the vestibule door, the "passenger area" of a MU Locomotive is used by both passengers and crew members. Conductors work everyday in the passenger section, collecting tickets and revenue and assisting passengers. The engineer sits in the passenger section while the train is preparing to leave. On the date of the accident, for example, Mr. Bolden's engineer, Mr. Fallis, sat in the passenger section of the MU Locomotive, awaiting the train's departure time.

The vestibule door consists of the door itself together with a pneumatic closing mechanism. A properly-functioning closing mechanism creates tension on the door requiring significant force to open the door.

At the time of Mr. Bolden's accident, the closing mechanism was defective. As a result, there was no tension at all on the door and when Mr. Bolden pushed the door to open it, he flew through the door and fell to the floor.

REASONS FOR DENYING THE WRIT

Petitioner seeks to persuade the Court that the *Lunsford* "integral or essential" test applies to the locomotive door mechanism at issue in this case, *in hopes that Petitioner will then be able to persuade the Court that the Pennsylvania appellate courts erroneously* ***applied*** *that test to the facts of this case*. This Court has made clear, however, that it does not wish to engage in the exercise of evaluating factual findings or in applying a rule of law to

those facts. Supreme Court Rule 10. For this reason, the Court should deny certiorari.

Even were the Court more predisposed to immerse itself in the factual findings of the courts below, certiorari would not be justified here because the factual record amply supports the Pennsylvania appellate courts' finding that the locomotive door and mechanism were "integral or essential" within the meaning of *Lunsford*.[2]

The Pennsylvania appellate courts' application of the "integral or essential" test was also consistent with the broad construction and humanitarian purpose of the BIA/LIA and with this Court's narrow holding in *Lunsford* not to impose strict liability under the Boiler Inspection Act (BIA) against a railroad seeking to promote safety through an experimental safety device.

The Pennsylvania appellate courts' decision also squares precisely with the well-established post-*Lunsford* case law, which distinguishes between *Failure-to-Maintain* cases (involving already-installed locomotive components) and *Failure-to-Install* cases (where a plaintiff argues that a certain device *should* be installed on a locomotive).

---

[2] Throughout its plea to this Court, Petitioner employs hyperbolic language decrying the Pennsylvania Supreme Court's opinion as an "unprecedented" and "inexplicable departure from *Lunsford*" and "70 years of unbroken and uniform jurisprudence," in hopes that Petitioner can somehow persuade this Court of "the magnitude of the extraordinary error that occurred." (Petition 16, 20, 9). In fact, however, it is Petitioner that seeks this Court to engage in a marked departure from the history, purpose and language of the BIA/LIA, from this Court's decision in *Lunsford* and from the consistent body of case law that has followed the *Lunsford* decision.

I. Petitioner's Dissatisfaction With The Pennsylvania Courts' Application of *Lunsford* Does Not Warrant Certiorari

Petitioner devotes the great bulk of its Petition indicting the Pennsylvania appellate courts for not applying *Lunsford*'s "integral or essential" test.[3] What Petitioner overlooks is that the Pennsylvania appellate court decision *did* evaluate the locomotive component at issue against that test and found it to be "integral or essential" based upon the factual record:

> *The door to which the closing mechanism is attached is clearly "integral or essential," for without it there would be no access for crew or passengers to the locomotive car while the train is moving.* The closing mechanism itself serves only to enhance the safety and comfort of passengers and crew alike. Because the door is absolutely "integral or essential" and the closing mechanism makes the door safer to operate, *it should fall within the liberal construction of the LIA and its purpose of enhancing safety under the* ***Lunsford*** *test at any rate.*

(Petition, Appendix 9a) (emphasis added).

---

[3] The last sections of the Petition reveal that Petitioner's ultimate hope here is that the Court will judicially legislate the "passenger sections" of MU locomotives out of the BIA/LIA. Petitioner also desires to limit the BIA/LIA to boilers and "unduly hazardous" components, or to parts that are "unique" to locomotives. The Petition's own recitation of the history of the BIA/LIA, however, makes clear that Petitioner's arguments fly in the face of Congress's intent to *expand* the BIA/LIA beyond boilers to cover the *entire* locomotive and all its parts, and to protect *passengers* and crew members alike. (Petition 9-12). Petitioner's proposed tests, which it draws from thin air, are unworthy of further comment.

That Petitioner is unhappy with how the Pennsylvania appellate courts applied the *Lunsford* "integral or essential" test should not justify certiorari. Supreme Court Rule 10.

A. The Factual Record Supports the Finding That The Locomotive Door and Closing Mechanism Were "Integral or Essential"

Even were the Court more predisposed to immerse itself in the factual findings of the courts below, certiorari would not be justified here because the factual record amply supports the Pennsylvania appellate courts' finding that the locomotive door and mechanism were "integral or essential" within the meaning of *Lunsford*.

The locomotive door at issue was used by both passengers and crew members to enter and exit the locomotive, and both Mr. Bolden and fellow crew members used the door to enter the locomotive on the day of the injury. The door also served the safety function of keeping passengers out of the vestibule while the train was moving. Finally, by closing automatically, the vestibule door served the passenger comfort and safety functions of retaining heat and air conditioning.

Fundamentally, of course, once installed, a *properly functioning* vestibule door was necessary to the *safe* functioning of the locomotive. That is, a defective door presents a safety hazard and could injure passengers and

crew, as it did here to Mr. Bolden.[4] Contrast this with *Lunsford* ("Respondent does not suggest that the Watchman, whether operative or not, detracted from safety or in any way contributed to the derailment").

B. The Pennsylvania Courts' "Integral or Essential" Finding Is Consistent With the Humanitarian Purpose and Broad Construction of the BIA/LIA

In finding the locomotive door and closing mechanism to be "integral or essential," the Pennsylvania appellate courts relied upon the "liberal construction of the LIA and its purpose of enhancing safety," recognizing that, "The prime purpose of the LIA is to enhance the safety of employees and passengers." (Petition, Appendix 9a, 7a).

Applying *Lunsford*'s "integral or essential" test liberally in light of the humanitarian purpose of the BIA/LIA harmonizes with this Court's own view of the Acts. *Urie v. Thompson*, 337 U.S. 163, 191-92 (1949) ("[W]e do not doubt that the prime purpose of the Boiler Inspection Act is the protection of railroad employees and perhaps also of passengers and the public at large from injury due to industrial accident"); *Lilly v. Grand Trunk Western Ry. Co.*, 317 U.S. 481, 486 (1943) (The [BIA], like the Safety Appliance Act, is to be liberally construed in light of its prime purpose, the protection of employees and others").

---

[4] As stated in *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1246 (8th Cir. 1985), "once any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it to be maintained in good repair at all times."

The Pennsylvania appellate courts' recognition of the humanitarian purpose and liberal construction of the BIA/LIA also accords with the decisions of the lower federal and state courts. *See Herold, supra*; *Whelan v. Penn Central Co.*, 503 F.2d 886, 890 (2nd Cir. 1974); *Palmer v. Union Pacific Railroad Co.*, 12 F.Supp.2d 588, 590 (S.D. Tex. 1998); *Southern Ry. Co. v. Bryan*, 375 F.2d 155, 158 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967); *Zollinger v. Pittsburgh and Lake Erie RR Co.*, 337 F.Supp. 913, 914 (W.D. Pa. 1972); *Fontaine v. National Railroad Passenger Corporation,* 63 Cal.Rptr.2d 644, 54 Cal.App.4th 1519, 1530 (Cal.App.3. Dist. 1997); *Missouri Pacific R. Co. v. Brown*, 862 S.W.2d 636, 638 (Tex.App. 1993); *Bankston v. Chesapeake & Ohio R. Co.*, 470 N.E.2d 512, 516 (Ill.App. 1 Dist. 1984); *Seaboard Coast Line Railroad Co. v. Jackson,* 256 So.2d 568, 570 (Fla.App. 1971), *cert. denied*, 409 U.S. 1001 (1972); *Duchsherer v. Northern Pacific Ry. Co.*, 4 Wash.App. 291, 294, 481 P.2d 929, 932 (1971); *Bolan v. Lehigh Valley R. Co.*, 167 F.2d 934, 936 (2nd Cir. 1948).

II. The Pennsylvania Courts' Decision Does Not Conflict With This Court's Holding in *Lunsford*

The Pennsylvania appellate courts refused to apply *Lunsford*'s "integral or essential" test to exclude from the BIA/LIA a non-experimental locomotive component already installed on a locomotive. This was entirely consistent with the precise holding of *Lunsford* as well as with this Court's concerns in reaching that decision.

Early in *Lunsford*, this Court *hinted* that it might hold broadly, stating that although the BIA had been much considered, "we have not heretofore undertaken to give

definite interpretation to the words 'parts and appurtenances.'" 297 U.S. at 401. Ultimately, however, the Court rendered a *narrow* holding: Relying on the BIA's goal of protecting railroad employees and passengers, the Court declined to impose BIA liability upon a railroad for trying to promote safety by experimenting with new safety devices. Stated otherwise, this Court, in construing a statute designed to promote safety, refused to *penalize* a railroad for seeking to develop new means to increase safety.

In *Lunsford*, an engineer was killed when his train struck a stone on the track and derailed. The locomotive was equipped with a "Wright's Little Watchman," which was intended to apply the brakes in cases of derailment. As this Court emphasized in its opinion, the Watchman device was "not in common use," and, because it was experimental, was not at a point where it could be relied upon.

Relying on the policy goal of promoting safety, this Court declined to impose BIA liability in respect of an experimental safety device whose ultimate goal was to increase safety:

> [I]t cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for *experimental* purposes, should become part thereof within the rule of absolute liability. *So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose – avoidance of unnecessary peril to life or limb.* Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But *mere experimental* devices *which do not increase the*

> *peril*, but may prove helpful in the emergency, are not.

297 U.S. at 402 (emphasis added).

III. The Pennsylvania Decision Aligns Squarely With The Post-*Lunsford* Distinction Between *Failure-To-Maintain* and *Failure-to-Install* Cases

In the seventy years since *Lunsford,* the state and federal courts have developed a consistent body of law that distinguishes between: (a) *Failure-to-Maintain* cases, where, as here, a person is injured by a component already installed on a locomotive; and (b) *Failure-to-Install* cases, where a plaintiff claims that a certain piece of equipment should have been installed on a locomotive.

In *Failure-to-Install* cases, the courts hold that under *Lunsford,* a carrier is not liable under the BIA/LIA for failing to install equipment unless the equipment is required by federal regulation, or is considered to be an "integral or essential" part of a locomotive. *Reed v. Norfolk Southern Ry. Co.*, 312 F.Supp.2d 924, 927 (N.D. Ohio, 2004), *citing Mosco Baltimore & Ohio Railroad*, 817 F.2d 1088, 1091 (4th Cir.), *cert. denied*, 484 U.S. 851 (1987); *King v. Southern Pacific Transp. Co.,* 855 F.2d 1485, 1488-89 (10th Cir. 1988).

In *Failure-to-Install* cases, the courts have universally applied *Lunsford*'s "integral or essential" test to exclude uninstalled hypothetical components from the ambit of the BIA/LIA. *Gardner v. CSX Transportation*, 201 W.Va. 490, 498 S.E.2d 473 (1997) (failure to install seatbelts and armrests on locomotive seats), *citing Mosco, supra* (failure to install screens, bars or grates on locomotive windows);

King v. Southern Pacific Transp. Co., supra, 855 F.2d at 1488-89 (failure to install armrest on locomotive seat); *McGinn v. Burlington Northern Railroad Co.*, 102 F.3d 295 (7th Cir. 1996) (failure to install luggage racks).

On the other hand, no case has been found in which a court used the *Lunsford* "integral or essential" test to exclude from the ambit of the BIA/LIA an already-installed locomotive component in a *Failure-to-Maintain* case.

As stated in *King v. Southern Pacific Transporation Co.*:

> "[*F*]*ailure to maintain" claims have been widely recognized as meritorious. However, those claims are entirely different from claims that a railroad is liable for failing to install additional safety devices* which the Secretary of Transportation has not seen fit to require . . . Such *"failure to install" claims have been rejected.*

855 F.2d at 1489 (emphasis added and in original). *See also Gardner v. CSX Transportation, supra*, 498 S.E.2d at 480.

Consistently, in every one of the *Failure-to-Maintain* cases cited by Petitioner, the courts found the installed component to be encompassed by the BIA/LIA. (Petition 15-18, notes 4, 5). In most of these cases, the courts did *not* hold the device at issue to be "integral or essential." *Herold v. Burlington Northern, supra*; *Green v. River Terminal Railway Co.*, 585 F.Supp. 1019 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1987); *Spade v. CSX Transp., Inc.*, 2004 WL 2980740 (W.D. Mich. 2004); *Seaboard*

Coastline Railroad Co. v. Jackson, 256 So.2d 568 (Fla.App. 1971), *cert. denied,* 409 U.S. 1001 (1972).[5] In both *Seaboard Coastline Railroad* and *Green v. River Terminal*, the railroad had argued that the radios were not "integral or essential" to the engine's movement, but the courts found the radios to be "parts or appurtenances" nonetheless.

Although some *Failure-to-Maintain* decisions mention *Lunsford*'s "integral or essential" language, the courts in these cases generally reach their holdings by broadly construing the "parts and appurtenances" language found in the texts of the BIA and LIA, consistent with the Acts' humanitarian purpose of promoting passenger and crew member safety. The courts distinguish *Lunsford* on the grounds that it dealt with an experimental device. *See Herold v. Burlington Northern, Inc., supra*; *Green v. River Terminal, supra*; *Seaboard Coast Line Railroad Co. v. Jackson, supra*; *Duchsherer v. Northern Pacific Railway Co., supra.*

Consistently, in the instant case, the Pennsylvania appellate courts properly recognized that *Lunsford*'s "integral or essential" test removes from the ambit of the BIA/LIA those cases "where experimental devices are used or carriers have failed to install required equipment," unlike the case at bar which, "deals with a failure to maintain equipment that is useful and increases safety on a locomotive car." (Petition, Appendix 6a-7a).

---

[5] In only two of the cases did the Court state explicitly that the component at issue was integral or essential. *Zolinger v. Pittsburg and Lake Erie R.R.*, 38 F.Supp. 913, 914 (W.D. Pa. 1972) (push-pole); *Hubbard v. National Railroad Passenger Corp.*, 2004 WL 1977646 (Mich.App. 2004) (engineer's seat).

CONCLUSION

For the foregoing reasons, Respondent Leonard Bolden respectfully requests the Court to deny the petition for certiorari to the Pennsylvania Supreme Court.

Respectfully submitted,

WILLIAM L. MYERS, JR., ESQUIRE
Counsel of Record

MYERS LAFFERTY LAW OFFICES, P.C.
Suite 810, 1515 Market Street
Philadelphia, PA 19102
(215) 988-1229

Date: February 13, 2007

Supreme Court, U.S.
FILED
FEB 28 2007
OFFICE OF THE CLERK

(3)

No. 06-1095

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

LEONARD BOLDEN,

Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of Pennsylvania

PETITIONER SEPTA'S REPLY TO APPELLEE'S BRIEF IN OPPOSITION TO CERTIORARI

Saul H. Krenzel, Esquire
Counsel of Record

SAUL H. KRENZEL & ASSOCIATES
42 South 15th Street, Suite 800
Philadelphia, PA 19102
(215) 977-7230

Nicholas J. Staffieri, Esquire
General Counsel for Southeastern
Pennsylvania Transportation Authority
Legal Division, Fifth Floor
1234 Market Street
Philadelphia, PA 19107
(215) 580-7450

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY TO ARGUMENTS RAISED IN RESPONDENT'S OPPOSITION TO CERTIORARI 1

I. Respondent's Claim That Review Of The Petition Requires This Court To Examine The Factual Findings Is Unfounded 1

II. Respondent Erroneously Claims That Petitioner Is Asking This Court To Review The Pennsylvania Appellate Court's Application Of *Lunsford* 3

III. Respondent's Claim That The Commonwealth Court Applied The *Lunsford* Test Suffers From The Same Malady Of Distortion As Respondent's Other Arguments Concerning Petitioner's Writ 4

IV. Respondent's Claims That Petitioner Is Dissatisfied With The Commonwealth Court's Application Of *Lunsford* Is Remarkably Askew 4

V. Respondent's Assertion That Post-*Lunsford* BIA Claims Are Analyzed Differently Is Unsupportable 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page**

Dougherty v. Underwriters at Lloyds, 6 F.3d 856 (1st Cir. 1993) 6

Fiske v. Kansas, 274 U.S. 380 (1927) 3

Hans v. Louisiana, 134 U.S. 1 (1890) 6

Southern Railway Co. v. Lunsford, 297 U.S. 398 (1936) ..... *passim*

Texas v. Mead, 465 U .S. 1041 (1898) 2

United States v. Johnson, 268 U.S. 200 (1928) 2

REPLY TO ARGUMENTS RAISED IN RESPONDENT'S OPPOSITION TO CERTIORARI

I. Respondent's Claim That Review Of The Petition Requires This Court To Examine The Factual Findings Is Unfounded.

Respondent argues that if this Court accepts the Petition, it will have to immerse itself in the factual findings of the courts below. This is markedly inaccurate. Petitioner's Statement of the Case has never been controverted. A review of the trial court and Commonwealth Court decisions reveals that the factual record was never in contest. Critically, the trial court and the Commonwealth Court recognized that the MU rail car consisted of a separate passenger compartment and a separate operating compartment. The lower court and the Commonwealth Court acknowledged that Mr. Bolden's injury occurred upon entering the passenger compartment. Both courts also recognized that the door closer, which caused the injury, was attached to a door leading into the seating compartment and not the operating compartment. (*See* App. at 12a.) Respondent's Counter-Statement of the Case neither controverts these important and uncontested facts nor, for that matter, any other facts in Petitioner's Statement of the Case.

Respondent asserts that the engineer, Mr. Fallis, sat in the passenger compartment and *implies* that this point eviscerates the structural and functional distinction between the MU operating compartment and the MU passenger compartment. Respondent, however, has not disputed that Mr. Fallis entered the MU operating cab by ascending a ladder attached to the operating compartment. That Mr. Fallis, thereafter, entered the passenger seating compartment

and sat down before he initiated train operations is no different from any engineer sitting in a passenger car and reading a newspaper before undertaking the operation of a locomotive; nor does Respondent dispute that the MU operating cab has a locked cab door preventing entry during train operation and only the engineer is in the cab.[1]

Respondent's statement that one of the conductors left a bag in the operating cab is neither relevant nor evidence that conductors perform their work in the operating cab. It is uncontested that conductors do not perform their duties in the operating cab. As vigorously as Respondent attempts to spin its arguments, Respondent cannot offer any factual assertions to contravene Petitioner's Statement of the Case and, indeed, neither the Commonwealth Court nor the trial court have disputed these facts in reaching their erroneous decisions. To the contrary, the facts forming Petitioner's Statement of the Case are evident in both opinions.[2]

Accordingly, this Court does not have to make any factual determinations or "immerse" itself in the facts which were determined below because they are uncontested.

---

[1] Respondent does not challenge the FRA safety regulations which treat the MU operating cab in a significantly different manner than the MU passenger compartment. (*See* Pet. at pg. 25-26.)

[2] The Supreme Court will usually deny certiorari when the Petition requests the Court "to [only] review evidence and discuss specific facts." *See United States v. Johnson*, 268 U.S. 220, 227 (1928); *Texas v. Mead*, 465 U.S. 1041 (1984). This Court will examine facts when a finding of fact is so

(footnote continues)

II. Respondent Erroneously Claims That Petitioner Is Asking This Court to Review The Pennsylvania Appellate Court's Application Of *Lunsford*.

It is incredulous for Respondent to contend that Petitioner is requesting this Court to review the Commonwealth's Court's application of *Southern Railway Co. v. Lunsford*, 297 U.S. 398 (1936) to the instant claim. Petitioner has appealed the obvious error below. Pennsylvania appellate courts have refused to apply the *Lunsford* test. Instead, the Pennsylvania Courts have embraced an analysis that limits *Lunsford* to a narrow class of claims and have determined, *ipse dixit*, that *Lunsford* is not controlling precedent in claims asserting a failure to maintain a part or appurtenance under the BIA. In no less than four pronouncements, the Commonwealth Court and the trial court opined, without any supporting authority, that *Lunsford* did not apply to claims that a rail carrier failed to maintain a part or appurtenance under the BIA. This is the gravamen of the Petition. Nothing Respondent argues can change how the Commonwealth Court has ruled and its ensuing divergence from all precedent under the BIA. (App. 6a, 7a; 23a-25a.)

(footnote continued)
intermingled with a conclusion of law that it is necessary when examining a federal question to analyze the facts. *See, e.g, Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). A mixed question of law and fact has not precluded this Court from accepting Petitions for Certiorari. For example, this Court in *Lunsford* examined whether the Little Watchman, was a "part or appurtenance" under the BIA. Clearly, cases involving the application of federal law may involve questions of mixed law and fact.

Respondent's fallacious contention is advanced in support of its effort to have this Court conclude that Petitioner has not demonstrated that the Commonwealth Court's decision is in conflict with *Lunsford* and seventy years of jurisprudence applying the *Lunsford* test. Respondent is aspirational (or hopeful) that this Court will overlook the unmistakable core and central premise of the Commonwealth Court's decision. Respondent's argument that Petitioner is challenging the Commonwealth Court's application of *Lunsford*, at best, is fanciful.

Petitioner is appealing the Commonwealth Court's unprecedented refusal to apply *Lunsford* which has led to an unwarranted extension of strict liability to a passenger seating area which neither Congress nor the *Lunsford* Court intended. This outcome alone warrants taking the Petition notwithstanding the clear conflict.

III. Respondent's Claim That The Commonwealth Court Applied The *Lunsford* Test Suffers From The Same Malady Of Distortion As Respondent's Other Arguments Concerning Petitioner's Writ.

The Commonwealth Court was very clear that it approved the trial court's decision to pigeon-hole *Lunsford* into cases concerning experimental devices or claims that a railroad failed to install a device. This is the central premise of the flawed analysis and errant ruling of the Commonwealth Court. It cannot be seriously argued that the Commonwealth Court, after it concluded that *Lunsford* was inapplicable, followed this Court's decision in *Lunsford*.

Adopting an unprecedented reading of *Lunsford*, the Commonwealth Court affirmed the trial court's decision to eschew applying the *Lunsford* test of a "part or appurtenance:"

> In applying the language of *Lunsford*, the trial court reasonably distinguished that holding based upon factual differences between *Lunsford* and the present case. *Lunsford* clearly controls cases where experimental devices are used in carriers or carriers have failed to install required equipment. The present case deals with a failure to maintain equipment that is useful and increases safety on a locomotive car, but is neither experimental nor required. [App. 6a-7a]
>
> * * *
>
> This Court notes SEPTA's extensive arguments that the *Lunsford* test of "integral or essential" was not applied by the trial court in determining whether the closing mechanism was a "part or appurtenance" under the LIA. We reject that argument on the ground that the trial court correctly distinguished the facts of this case from the *Lunsford* case's facts and holding. [App. 8a-9a]

In a further renunciation that *Lunsford* is controlling precedent, the Commonwealth Court opined in *obiter dictum* that "we do not believe that the closing mechanism would necessarily fail the *Lunsford* test." *See Hans v. Louisiana*, 134 U.S. 1 (1890) (*obiter dictum* is a discussion "unnecessary to the decision and in that sense extrajudicial"). Implicit to the lower court's *obiter dictum* is that *Lunsford* is

one of several tests to determine whether a part or appurtenance is covered under the BIA. It is plain that the Commonwealth Court's decision is not grounded in applying *Lunsford*. Rather, the driving rationale of the Commonwealth Court's decision was to renounce *Lunsford* and cobble together its own test under the BIA.

Respondent's argument that the Commonwealth Court's decision is an application of *Lunsford* is a Houdini effort to transform a decision that emphatically renounces application of *Lunsford* into a decision that applies *Lunsford*. The basis for this "head over heels" transformation is the *obiter dictum* of the Commonwealth Court. The Commonwealth Court, however, was unwavering in its ruling that *Lunsford* has no application to the instant claim of a defective part. Having found that *Lunsford* only applied to failure to install claims or experimental devices, it cannot be seriously argued that the Commonwealth Court has applied *Lunsford* in reaching its decision.[3]

Respondent's ill-conceived argument is offered in furtherance of its effort to portray the Commonwealth Court's decision as consistent with controlling precedent and not a departure from *Lunsford* and all BIA jurisprudence. Respondent pleas for this Court to ignore the Commonwealth Court's specific affirmance of the trial court's refusal to apply *Lunsford*, and *its* adoption of the *same* rationale

---

[3] *See Dougherty v. Underwriters at Lloyds*, 6 F.3d 856, 861 (1st Cir. 1993) ("*Dictum* is a term that judges and lawyers use to describe comments relevant but not essential to the disposition of legal questions pending before a court" (internal citations omitted)).

consigning *Lunsford* to the dust bin of historical irrelevancy. This necessarily follows since over 99% of the cases concerning a "part or appurtenance" under the BIA proffer the claim that a carrier failed to maintain an item on a locomotive.

Respondent cannot dispute that the reasoning central to the Commonwealth Court's decision was that *Lunsford* is inapplicable to failure to maintain claims, the precise type of claim at issue here. The courts of Pennsylvania have failed to follow controlling precedent in the determination of a part or appurtenance under the BIA. Pennsylvania courts have departed from this Court's seminal decision in *Lunsford* and run counter to the body of jurisprudence applying *Lunsford*.

A split in the decisional law governing a federal statute cannot be denied.

IV. Respondent's Argument That Petitioner Is Dissatisfied With The Court's Application Of *Lunsford* Is Remarkably Askew.

Respondent's argument that Petitioner is dissatisfied with the Commonwealth Court's application of *Lunsford* is an extraordinary effort of distorting the Petition and the lower court's decision. A review of the Petition for Certiorari leaves little doubt that Petitioner is not arguing that the Commonwealth Court misapplied *Lunsford*. Petitioner is challenging the Commonwealth Court's unprecedented departure from *Lunsford*.

Respondent's argument is a part of its exertions to convince this Court that the Pennsylvania courts have not renounced *Lunsford* and have not developed their own test to determine whether an item is a "part

or appurtenance" under the BIA. Respondent is hopeful that this Court will ignore the Commonwealth Court's (1) central premise; (2) rationale; and (3) holding that *Lunsford* is not controlling precedent in failure to maintain claims.

Respondent's argument relies on the Commonwealth Court's *obiter dictum* that the door closer nonetheless would meet the *Lunsford* test. After having found *Lunsford* inapplicable and not controlling, Respondent cannot transform the Commonwealth Court's decision into an application of *Lunsford*. It cannot be seriously argued that this Court should conclude that the Commonwealth Court has applied *Lunsford* since its core premise is that *Lunsford* is not controlling precedent in a failure to maintain claim.

A remarkable split in the jurisprudence governing a federal statute has occurred. The Commonwealth Court's defiance of the *Lunsford* decision has resulted in the extension of strict liability in a manner that controverts Congressional intent supporting the passage of the BIA.

V. Respondent's Assertion That Post-*Lunsford* BIA Claims Are Analyzed Differently Is Unsupportable.

Respondent asserts that the Commonwealth Court's decision aligns with "the post-*Lunsford* distinction between failure to maintain and failure to install cases." (Respondent's Opposition at pg. 9.) Respondent has neither quoted nor given attribution to *any* court that has ruled that these two types of claims are to be analyzed differently *or* that the *Lunsford* test is not applicable to failure to maintain

claims. Respondent has yet to establish where in the BIA jurisprudence this distinction is drawn.

Post-*Lunsford* decisions do not employ a different analysis when evaluating these two theories proffered in support of BIA claims. Most certainly, no court has relegated *Lunsford* to a specific theory, shunted *Lunsford* aside and discounted its application to failure to maintain claims – the vast majority of cases under the BIA.

CONCLUSION

There is a marked conflict between this case, *Lunsford's* seminal decision and all other federal and state court tribunals interpreting the BIA.

Public policy grounds alone mandate that *certiorari* be granted, to correct this unwarrented extension of strict liability

Respectfully submitted,

SAUL H. KRENZEL, ESQUIRE
Counsel of Record
Saul H. Krenzel & Associates
42 South 15th Street, Suite 800
Philadelphia PA 19102
(215) 977-7230

NICHOLAS J. STAFFIERI, ESQUIRE
General Counsel for Southeastern
Pennsylvania Transportation Authority
Legal Division, 5th Floor
1234 Market Street
Philadelphia, PA 19107
(215) 580-7450

Date: February 28, 2007